(24,375)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 631.

WILLIAM H. MILLS, AS SURVIVING PARTNER AND LIQUIDATOR OF J. MITCHELL CLARK, WILLIAM H. MILLS, AND J. ARMSTRONG RAWLINS, COPARTNERS, TRADING UNDER THE FIRM NAME OF NAYLOR & COMPANY, PLAINTIFF IN ERROR,

vs.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 21, 1915.

1 April Session, 1911.

1416.

J. MITCHELL CLARK, WILLIAM H. MILLS, and J. ARMSTRONG Rawlins, Co-partners, Trading under the Firm Name of Naylor & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company.

Arthur R. Thompson.
Frank Van Sant.
Vivian Frank Gable.

John G. Johnson for Lehigh Valley Railroad Co., Buffalo, Rochester & Pittsburgh Rwy. Co., N. Y. Central & H. R. R. Co.
John G. Lamb for Philad'a & Reading Rwy. Co..
James F. Campbell for D. L. & W. R. Co.
Dickson, Beitler & McCouch for Central R. R. of N. J.
Abraham M. Beitler for Phila. & Reading Rwy. Co.

1911, May 31. Petition filed.
Exhibits "A", "B" and "C" filed.

" June 1. Order of Court directing defendants to plead, answer or demur filed.

" " 8. Order for the appearance of John G. Johnson, Esquire, for Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company and New York Central & Hudson River Railroad Company, defendants, filed.

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" " 14. Order for the appearance of John G. Lamb, Esquire, for Philadelphia & Reading Railway Company, one of defendants, filed.
Acceptance of service of petition, &c., on behalf of Philadelphia & Reading Railway Company, one of defendants, filed.
Plea of Philadelphia & Reading Railway Company filed.

" " 17. Plea of Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railroad Company, and New York Central & Hudson River Railroad Company, defendants, filed.

" " 22. Order for the appearance of James F. Campbell, Esquire, for Delaware, Lackawanna & Western Railroad Company, one of defendants, filed.

Plea of Delaware, Lackawanna & Western Railroad Company filed.

" Sept. 28. Order for the appearance of John G. Johnson, Esquire, for Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company, and New York Central & Hudson River Railway Company filed.

" " 28. Acceptance of service of petition and order directing filing of plea, &c., on behalf of Lehigh Valley Railroad Company; Buffalo, Rochester
3 & Pittsburgh Railway Company and New York Central & Hudson River Railway Company filed.

Order for the appearance of Dickson, Beitler & McCouch, Esquires for Central Railroad Company of New Jersey filed.

Acceptance of service of petition and of order directing filing of plea &c. on behalf of Central Railroad Company of New Jersey filed.

Order to place case on trial list filed.

" Dec. 22. Order for the appearance of Abraham M. Beitler, Esquire, for Philadelphia & Reading Railroad Company filed.

1912, June 13. Order to place case on trial list filed.

" October 21. Jury called.

Verdict for plaintiffs against Buffalo, Rochester & Pittsburgh Railway Company and Philadelphia & Reading Railway Company for $3,684.51; against New York Central & Hudson River Railroad Company and Philadelphia & Reading Railway Company for $331.08; against Delaware, Lackawanna & Western Railroad Company and Central Railroad Company of New Jersey for $633.79; against Lehigh Valley Railroad Company and Central Railroad Company of New Jersey for
4 $1,329.40; and against Lehigh Valley Railroad Company and Philadelphia & Reading Railway Company for $3,065.76.

" " 22. Motion for judgment non obstante veredicto filed.

" " 30. Order refusing motion for judg. n. o. v. &c., filed.

" " 31. Motion to tax counsel fees as part of costs filed.

Præcipe for judgment filed.

Judgment accordingly.

" Nov. 1. Bill of Exceptions filed.
" " 9. Specifications of error filed.
Petition for writ of error filed.
Order allowing writ of error filed.
" " 13. Stipulation for record sur writ of error filed.
" " 26. Bond sur writ of error filed.
Order approving bond sur writ of error filed.
Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
Citation allowed and issued.
" " 29. Citation returned "service accepted" and filed.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, co-partners, trading under the firm name of Naylor & Company, Plaintiffs, against Leigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; New York Central & Hudson River Railroad Company; Philadelphia & Reading Railway Company; Central Railroad Company of New Jersey; Delaware, Lackawanna & Western Railroad Company, Defendants, a manifest error hath happened, to the great damage of the said Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; New York Central & Hudson River Railroad Company; Philadelphia & Reading Railway Company; Central Railroad Company of New Jersey; Delaware, Lackawanna & Western Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of

6 Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable the Judges of the District Court of the United States, at Philadelphia, the 26th day of November, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before Holland, J.
Allowed:
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

7 In the Circuit Court of the United States, Eastern District of Pennsylvania.

J. MITCHELL CLARK, WILLIAM H. MILLS, and J. ARMSTRONG Rawlins, Co-partners, Trading under the Firm Name of Naylor & Company, Petitioners,

vs.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Corporations, Defendants.

Petition.

Filed May 31, 1911.

To the Honorable Judges of the Circuit Court of the United States within and for the Eastern District of Pennsylvania:

Your petitioners, J. Mitchell Clark, William H. Mills, J. Armstrong Rawlins, co-partners, trading under the firm name of Naylor & Company, with their principal place of business at No. 45 Wall Street, New York City, State of New York, humbly complaining show.

8 I.

That your petitioners are lawfully and legally entitled to receive and recover, and do hereby claim, from the said defendants, the several amounts of money hereinafter set forth as and for damages and reparation in accordance with an order of the Interstate Commerce Commission, dated June 2, 1910, a copy of which order is hereto attached, marked "Exhibit C" and which your petitioners pray may be made a part hereof, and in accordance with the Acts of Congress in such cases made and provided; and the said defendants justly and legally owe to the said petitioners the said several amounts of money hereinafter set forth, together with interest and a reasonable attorney's fee to be taxed as part of the costs against each of said defendants; a statement of which said several amounts of money claimed in this proceeding by the said petitioners from the said defendants is as follows, to wit:

From the Buffalo, Rochester & Pittsburg Railway Company, and

the Philadelphia & Reading Railway Company, the sum of Two thousand, eight hundred and forty-six dollars and fifty-five cents ($2,846.55) with interest thereon at the rate of six per centum (6%) per annum from November 21, 1907.

From the New York Central & Hudson River Railroad Company and the Philadelphia & Reading Railway Company the sum of Two hundred and forty-eight dollars and ninety-three cents ($248.93) with interest thereon at the rate of six per centum (6%) per annum from April 19, 1907.

From the Delaware, Lackawanna & Western Railroad Company and the Central Railroad Company of New Jersey, the sum of Four hundred and eighty-seven dollars and fifty-two cents ($487.52) with interest thereon at the rate of six per centum (6%) per annum from September 23, 1907.

From the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey the sum of One thou-
9 sand and twenty-four dollars and fifteen cents ($1,024.15) with interest thereon at the rate of six per cenutm (6%) per annum from November 13, 1907.

From the Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company the sum of two thousand, three hundred and sixty-two dollars and twenty-three cents ($2,362.23) with interest thereon at the rate of Six per centum (6%) per annum from November 13, 1907.

II.

That the defendants are and were prior to any and all dates mentioned in this petition common carriers, engaged in the interstate transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from point of origin at Buffalo, New York, to points of destination as follows: Pottstown, Hazard, Swedeland, Temple, Reading, Catasauqua and Emaus, all in Pennsylvania, and Newark and Phillipsburg in New Jersey, which transportation is subject to the provisions of the "Act to Regulate Commerce," approved February 4, 1887, and all Acts supplemental thereto and amendatory thereof. That two of the defendants herein, to wit: The Philadelphia & Reading Railway Company and the Lehigh Valley Railroad Company, are in this District, to wit: the Eastern District of the State of Pennsylvania, having their principal operating offices in Philadelphia, Pennsylvania.

III.

That during the years 1906, 1907, 1908 and up to February 25, 1909, the defendants published, exacted and collected from your petitioners the rate of Two dollars ($2.00) per gross ton for the trans-
portation of pyrites cinder by rail from and to the points of
10 origin and destination set forth in "Exhibit A" hereto attached, which exhibit your petitioners humbly pray may be made and considered as part of this petition; that the aforesaid transportation rate of Two dollars ($2.00) on pyrites cinder, as claimed

in the aggregate in paragraph one hereof, was unlawful and excessive and the exacting, charging and collecting of same by the defendants from your petitioners for the transportation services rendered was a greater compensation than was demanded, collected and received from other parties for the performance by the defendants as common carriers of a like and contemporaneous service in the transportation of a like commodity under substantially similar circumstances and conditions, to wit, of iron ore, upon which the rate was $1.45 per ton to similar points of destination, as appears set forth more at length in "Exhibits B and C," which are attached hereto as part of this petition; all of which was in violation of Sections One, Two and Three of the Interstate Commerce Act and an unjust discrimination to the prejudice, disadvantage and damage of your petitioners.

IV.

That petitioners, through their agent, the General Chemical Company of Buffalo, New York, delivered to the defendants at Buffalo, New York on divers occasions, during the years 1906 and 1907, pyrites cinder for interstate shipments, which deliveries were received by the defendants and transported by them from Buffalo, New York, to points of destination in Pennsylvania and New Jersey as aforesaid in the following manner, to wit:

The Buffalo, Rochester & Pittsburg Railway Company and its connecting road, the Philadelphia & Reading Railway Company, one hundred and eighty-nine (189) carloads, aggregating 5,175 1590/2240 tons, on which these defendants unlawfully exacted and collected from the petitioners, through their aforesaid agent, the freight rate of Two Dollars ($2.00) per gross ton.

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The New York Central & Hudson River Railway Company and its connecting road, the Philadelphia & Reading Railway Company, Thirteen (13) carloads, aggregating 452 1370/2240 tons, on which these defendants unlawfully exacted and collected from the petitioners, through their aforesaid agent, Two Dollars ($2.00) per gross ton.

The Delaware, Lackawanna & Western Railway Company and its connecting road, the Central Railroad Company of New Jersey, Thirty-one (31) carloads, aggregating 886 960/2240 tons, on which these defendants unlawfully exacted and collected from the petitioners, through their agent, the freight rate of Two Dollars ($2.00) per gross ton.

The Lehigh Valley Railroad Company and its connecting road, the Central Railroad Company of New Jersey, seventy-four (74) carloads), aggregating 1,862 220/2240 tons, on which these defendants unlawfully exacted and collected from the petitioners through their agent, aforesaid, the freight rate of Two Dollars ($2.00) per gross ton.

The amounts of said shipments more at length appear in said "Exhibit A" hereto attached and made a part of this petition; and all of which aforesaid matters more fully appear in the certified copy of the Order of the Interstate Commerce Commission, number 168,

dated June 2, 1910, marked Exhibit "C," hereto attached and made part of this petition.

V.

That the petitioners duly filed with the Interstate Commerce Commission on April 4, 1908, a complaint attacking the aforesaid rate of Two Dollars ($2.00) per gross ton on pyrites cinder as excessive, unjust, unreasonable and unduly discriminatory and there-
12 fore in violation of the "Act to Regulate Commerce," approved February 4, 1887, and all Acts amendatory thereof and supplemental thereto, praying that the defendants be ordered to desist from exacting and collecting such unreasonable rate of Two Dollars ($2.00) per gross ton on pyrites cinder from and to the points of origin and destination aforesaid; that a lower rate be put in effect and that reparation be granted to the petitioners, which complaint was accompanied by a copy of Exhibit "A" hereto attached, and because of said Exhibit "A" being filed with the original complaint before the Interstate Commerce Commission such exhibit includes shipments which moved more than two years prior to the filing of such complaint, which shipments are barred by the Statute of Limitations and not included in the Commission's Order, marked Exhibit "C" hereto attached. Defendants being duly served with a copy of said complaint, made answer thereto, issue was joined and the cause regularly heard and argued by all parties thereto and submitted November 25, 1908, resulting in a finding, duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., January 5th, 1909, Docket Number 1511, Opinion number 746, ordering the said Two Dollar ($2.00) rate on pyrites cinder reduced to a rate not to exceed One Dollar and Forty-five Cents ($1.45) per gross ton from the points to the points hereinabove named; said Order to take effect not later than February 25th, 1909. A certified copy of which finding, with the conclusions and order of the Commission is hereto attached, marked Exhibit "B," and made part of this petition.

VI.

That defendants duly complied with aforesaid Order of the Interstate Commerce Commission and on or before February 25th, 1909, established and put in effect, and now have in effect the
13 aforesaid reduced transportation rate on pyrites cinder from Buffalo, New York, to the aforesaid points in Pennsylvania and New Jersey, pursuant to the Order of the Commission.

VII.

That on May 8, 1909, your petitioners duly filed with the Interstate Commerce Commission at Washington, D. C., a motion for a rehearing on the question of reparation alone, pursuant to the aforesaid Order of the Commission of January 5, 1909, Exhibit "B" hereto attached, which motion was regularly and duly granted at a

general session of the Commission on November 9, 1909. Due notices of the granting of such motion was given to all parties, who appeared at the taking of additional testimony by the petitioners; briefs were filed and oral argument had at a general session of the Commission on May 6, 1910, resulting in a finding regularly and properly made by the Interstate Commerce Commission at a general session held on June 2, 1910, ordering the defendants to pay reparation to the petitioners as set forth in paragraph one hereof and as fully appears in the certified copy of the report, conclusions and order of the Interstate Commerce Commission on the rehearing in Opinion number 168, Docket number 1511, dated June 2, 1910, hereto attached, marked Exhibit "C," and made part of this petition.

VIII.

That petitioners aver that a true copy of the aforesaid Order of the Interstate Commerce Commission, dated June 2, 1910, Opinion number 168, Docket number 1511, was duly served upon the defendants in the above entitled cause and demand made that they should pay to the said petitioners the said sum claimed in this petition, and as set forth in the aforesaid Order of the Commission, dated June 2, 1910, Exhibit "C" hereto attached, and that said defendants have wholly failed, neglected and refused to pay the said
14 sums or any part thereof, and that said sums or any part thereof have not been paid by the said defendants, or by anyone on their behalf to the said petitioners or to any one on their behalf. Hence this proceeding to enforce the aforesaid Order of the Interstate Commerce Commission, as provided by the "Act to Regulate Commerce," approved February 4, 1887, and all Acts supplemental thereto and amendatory thereof, which order was regularly and lawfully made.

Wherefore, the said J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, co-partners, trading under the firm name of Naylor & Company, as aforesaid, do respectfully pray:

First. That your Honorable Court will enter a rule and order the said defendants, Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, to file within thirty days of the service of a copy of this petition, together with said Order, a plea, answer or demurrer to said petition.

Second. That this Honorable Court will, by its order, fix a time and place for the trial of this cause, in accordance with said Act to Regulate Commerce.

Third. That this Honorable Court will hear, determine and adjudicate the matters involved in this cause hereinabove and the said Exhibits hereto attached and set forth.

Fourth. That this Honorable Court may make such other order or orders in the premises as may be meet and proper.

THOMPSON & VAN SANT,
VIVIAN FRANK GABLE,
Resident Counsel.

133 S. 12th St., Philadelphia, Pa.

15 STATE OF NEW YORK,
County of New York, ss:

William H. Mills, being duly sworn according to law, doth depose and say that he is one of the petitioners in the above entitled cause of action and that the matters and facts set forth in the foregoing petition, as basis thereof, are true and correct, to the best of his information, knowledge and belief.

WILLIAM H. MILLS.

Sworn to and subscribed before me this 26th day of May, A. D. 1911.

[SEAL.]

WM. I. BATEMAN,
Notary Public, N. Y. County.

My Commission expires March 31st, 1912.

16 Table of Shipments.

EXHIBIT "A".

SHIPMENTS OF PYRITES CINDER BY NAYLOR & CO.

FROM

BUFFALO, N. Y., TO EASTERN PENNSYLVANIA FURNACE POINTS ON WHICH A FREIGHT OF $2.00 PER GROSS TON WAS PAID.

RECAPITULATION.

Shipped Via	Gross Tons	Pounds	Freight Paid
Buf. Roch. & Pitts. R. R. (Table 1)	2707	1590	$5415.71
N. Y. C. & H. R. R. R. (Table 2)	105	1800	211.60
Del. Lack. & W. R. R. (Table 3)	886	960	1772.77
Lehigh Valley R. R. (Table 4)	5517	320	11037.35
N. Y. C. & H. R. R. R. (Table 5)	346	1810	693.62
Lehigh Valley R. R. (Table 6)	639	2160	1279.86
Buf. Roch. & Pitts. R. R. (Table 7)	2850	1760	5701.67
Grand Total	13054 9-14		$26112.58

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TABLE I.

SHIPMENTS VIA BUFFALO, ROCHESTER & PITTSBURG RAILWAY CO.

Delivery made by Philadelphia & Reading R. R. Co. at destinations.

Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1907 Jan. 18	6406 BR&P	93400	Pottstown, Pa.	Warwick Iron & Steel Co.	$83.39
" 18	11281 BR&P	91600	"	"	81.79
" 18	11639 BR&P	90800	"	"	81.07
" 19	16300 BR&P	86600	"	"	77.32
" 26	11693 BR&P	89400	"	"	79.82
" 28	12590 BR&P	87250	"	"	77.90
" 28	10450 BR&P	45600	"	"	40.71
" 30	7181 BR&P	56250	"	"	50.23
Feb. 11	15797 BR&P	62000	"	"	55.36
" 12	2018 PG&CC	58500	"	"	52.23
April 6	10905 PC&LE	80500	"	"	71.88
" 5	52242 B&O	55000	"	"	49.11
" 8	29042 PMcK&Y	87400	"	"	78.04
" 9	11646 BR&P	50480	"	"	45.07
" 9	10928 BR&P	48850	"	"	43.62
" 10	21308 P&R	47000	"	"	41.96
" 11	72754 NYC&H	88000	"	"	78.57
" 11	11154 BR&P	45700	"	"	40.80
" 12	72518 NYC&H	88000	"	"	78.57
" 12	10532 BR&P	52650	"	"	47.00
July 25	15362 BR&P	68800	"	"	61.42
" 25	11697 BR&P	69400	Hazard, Pa.	New Jersey Zinc Co.	61.96
					61.96
" 25	16500 BR&P	70500	"	"	62.95
" 25	9145 BR&P	67700	"	"	60.45
" 25	12285 BR&P	73870	"	"	65.96
" 25	36973 P&R	66000	"	"	58.93
" 26	16229 BR&P	87550	"	"	78.17
" 26	12320 BR&P	88150	"	"	78.71
" 26	15295 BR&P	64500	"	"	57.59
" 26	11653 BR&P	76800	"	"	68.57
" 26	6621 BR&P	85000	"	"	75.89
" 26	15539 BR&P	66600	"	"	59.46
" 26	12671 BR&P	47200	"	"	42.14
" 26	5770 BR&P	60500	"	"	54.02
" 26	11946 BR&P	75400	"	"	67.32
" 29	15209 BR&P	60700	"	"	54.20
" 29	16428 BR&P	57700	"	"	51.51
" 29	15879 BR&P	59900	"	"	53.48
" 29	15273 BR&P	58800	"	"	52.50
" 30	12461 BR&P	67000	"	"	59.82
" 26	12272 BR&P	59050	"	"	52.72
" 26	10091 BR&P	51500	"	"	45.98

18 **Table of Shipments.**

Date Shipment		Car No.		Weights	Delivery Point	Consignees	Freight Paid
1907							
Aug.	1	80075	CRRNJ	50250	"	"	44.87
"	1	12686	BR&P	69800	"	"	62.32
"	1	15676	BR&P	57550	"	"	51.38
"	2	11705	BR&P	61600	"	"	55.00
"	2	15283	BR&P	56500	"	"	50.45
"	2	16011	BR&P	76600	"	"	68.39
"	2	9739	BR&P	55100	"	"	49.20
"	2	11358	BR&P	45000	"	"	40.18
"	3	5612	BR&P	65250	"	"	58.25
"	3	7981	BR&P	44650	"	"	39.87
"	29	83938	NYC&H	67830	"	"	60.56
"	29	86432	NYC&H	55700	"	"	49.73
"	29	17299	D&H	79450	"	"	70.90
"	30	10449	PB&LE	68670	"	"	61.31
Sept.	9	8814	P&R	54450	Swedeland, Pa.	R. Heckscher & Sons Co.	48.62
"	9	6074	P&R	52500	"	"	46.88
"	9	5524	P&R	51400	"	"	45.89
"	9	7664	P&R	45680	"	"	40.78
"	9	9684	D&HC	77020	"	"	68.76
"	9	9154	P&R	58000	"	"	51.79
"	9	6022	P&R	48170	"	"	43.01
"	11	15296	BR&P	64100	"	"	57.23
"	27	34743	P&R	53650	Temple, Pa.	Temple Iron Co.	47.90
"	27	31326	P&R	51900	"	"	46.33
"	27	38460	P&R	46150	"	"	41.20
"	27	57595	P&R	45600	"	"	40.71
"	27	59068	P&R	43200	"	"	38.57
"	28	35614	P&R	49650	"	"	44.33
"	28	34518	P&R	50880	"	"	45.43
"	28	38071	P&R	52000	"	"	46.43
"	27	47059	P&R	53800	"	"	48.03
Oct.	5	58782	P&R	53400	Swedeland, Pa.	R. Heckscher & Sons Co.	47.68
"	5	49870	P&R	49000	"	"	43.75
"	5	23398	P&R	76900	"	"	68.66
"	5	44973	P&R	55000	"	"	49.10
"	5	47453	P&R	49400	"	"	44.10
"	7	37306	P&R	61550	"	"	54.95
"	7	45407	P&R	52080	"	"	46.50
"	7	45665	P&R	48550	"	"	43.35
"	7	48372	P&R	52360	Temple, Pa.	Temple Iron Co.	46.75
"	7	32413	P&R	54300	"	"	48.48
"	7	38059	P&R	52660	"	"	47.01
"	9	5557	BP&R	57400	"	"	51.25
"	17	701953	Penn	62400	Swedeland, Pa.	R. Heckscher & Sons Co.	55.71
"	17	230528	PRR	52100	"	"	46.52
"	29	37556	P&R	56100	Pottstown, Pa.	Warwick I. & S. Co.	50.09

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Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
" 29	36977 P&R	51200	"	"	45.71
" 29	30282 P&R	49400	"	"	44.10
" 29	36109 P&R	53800	"	"	48.04
" 29	38564 P&R	54800	"	"	48.93
" 29	38242 P&R	56400	"	"	50.35
" 29	34916 P&R	56000	"	"	50.50
" 29	37041 P&R	50400	"	"	45.00
" 29	37507 P&R	57800	"	"	51.60
Nov. 21	82296 CRRNJ	68840	"	"	61.46
" 21	49495 P&R	45780	"	"	40.88
" 21	49327 P&R	47950	"	"	42.81
		6,055270 lbs. or 2707—1590-2240 tons			$5,415.71

TABLE II.

SHIPMENTS VIA NEW YORK CENTRAL & HUDSON RIVER R. R. CO.

Delivery made by Philadelphia & Reading R. R. Co. at destinations.

Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1907 April 18	72579 N. Y. C.	76600	Pottstown, Pa.	Warwick I. & S.	$68.40
" 19	71504 "	80000	"	"	71.42
" 19	71236 "	80400	"	"	71.78
		237000 lbs. or 105-1800.2240 tons.			$211.60

20 Table of Shipments.

TABLE III.

SHIPMENTS VIA DELAWARE, LACKAWANNA & WESTERN RY. CO.

Delivery made at destinations by Central R. R. of New Jersey.

Date Shipment	Car No.	Weights		Delivery Point	Consignees	Freight Paid
1907						
Sept. 16	PR	24958	65450	Newark, N. J.	Nat. Met. Co.	
" 16	PR	24920	68380	"	"	
" 16	PR	48038	45500	"	"	$160.12
" 17	PR	20197	52000	"	"	
" 17	BO	43106	82900	"	"	
" 17	BO	40459	82450	"	"	323.19
" 17	BO	42774	82470	"	"	
" 18	CRRNJ	88032	62150	"	"	
" 17	CRRNJ	81276	77780	"	"	69.45
" 18	BO	36918	77350	"	"	
" 18	PR	20603	48900	"	"	
" 18	PR	48588	54680	"	"	
" 18	PR	22617	58100	"	"	322.54
" 18	PR	20529	54000	"	"	
" 18	PR	24740	68300	"	"	
" 20	SAL	33494	76600	"	"	68.39
" 19	PR	9271	75100	"	"	
" 19	PR	1344	88000	"	"	
" 19	CRRNJ	80196	69200	"	"	331.79
" 19	CRRNJ	80802	75100	"	"	
" 19	BO	63739	64200	"	"	
" 20	NW	45986	70470	"	"	62.92
" 20	MO	12400	66000	"	"	58.93
" 21	PR	20536	51400	"	"	
" 21	PR	57897	48000	"	"	
" 21	PR	21743	48500	"	"	265.00
" 21	PR	21871	52410	"	"	
" 23	PR	21018	46400	"	"	
" 23	PR	48218	50050	"	"	
" 23	CRRNJ	81134	58300	"	"	110.44
" 21	BO	38273	65400	"	"	
		1985600 lbs.		886.960 tons.		$1772.77

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TABLE IV.

SHIPMENTS VIA LEHIGH VALLEY RAILROAD COMPANY.

Delivery made by Philadelphia & Reading Ry. Co. at all destinations, except Newark and Hazard, N. J., at which deliveries made by Central R. R. Co. of New Jersey.

Date Shipment	Car No.		Weights	Delivery Point	Consignees	Freight Paid
1907						
				Pottstown, Pa.	Warwick I. & S. Co.	$56.35
			63100			52.02
Jan. 29	46751	LV	58250	"	"	52.24
Feb. 4	52180	LV	58500	"	"	48.22
" 4	54372	LV	54000	"	"	47.78
" 5	56336	LV	53500	"	"	58.94
" 5	49412	LV	66000	"	"	52.51
" 21	48971	LV	58800	"	"	56.08
" 14	47034	LV	62800	"	"	51.97
" 15	52563	LV	58200	"	"	49.47
" 14	46089	LV	55400	"	"	51.62
" 13	47257	LV	57800	"	"	
" 13	49050	LV	54300	Reading, Pa.	Empire Steel & I. Co.	48.49
Mch. 4	48522	LV				
			62400	Pottstown, Pa.	Warwick I. & S. Co.	55.72
Feb. 16	53691	LV				51.97
			58200	"	"	50.79
" 18	53324	LV	63600			
" 18	48457	LV	55000	Reading, Pa.	Empire S. & I. Co.	49.12
Mch. 6	46816	LV				49.65
			55600	"	"	55.16
" 6	56650	LV	61770	"	"	56.17
" 8	54362	LV	62950			
" 8	46779	LV	53200	Pottstown, Pa.	Warwick I. & S. Co.	47.51
" 30	46694	LV				
			59400	Reading, Pa.	Empire S. & I. Co.	53.04
" 19	56107	LV				49.20
			55100	"	"	56.97
" 19	47632	LV	63800			
" 19	52710	LV	58050	Pottstown, Pa.	Warwick I. & S. Co.	51.84
" 26	56446	LV				51.15
			57280	"	"	52.58
" 27	3209	B&O	65600	"	"	49.20
April 10	53077	LV	55100	"	"	53.22
" 10	52388	LV	59600	"	"	57.96
" 6	49820	LV	64900	"	"	51.66
" 3	46488	LV	57850	"	"	55.23
" 20	54293	LV	61850	"	"	48.04
" 22	46486	LV	53800	"	"	53.13
" 22	1609	DSS&L	59500	"	"	41.66
" 24	52300	LV	45650	"	"	50.45
" 23	53138	LV	56500	"	"	
" 23	49986	LV	64280	Phillipsburg, N. J.	Andover Iron Co.	57.40
" 26	47726	LV				57.60
			64525	"	"	
" 26	46827	LV				

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Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1907					
" 26	57981 LV	65900	"	"	58.85
" 26	49563 LV	65625	"	"	58.60
" 27	49704 LV	61100	"	"	54.56
" 27	48564 LV	57700	"	"	51.53
" 27	46372 LV	60150	"	"	53.71
" 25	53503 LV	57750	"	"	51.57
" 25	48671 LV	60400	"	"	53.94
" 29	48479 LV	66000	"	"	58.94
May 9	49593 LV	52900	Pottstown, Pa.	Warwick I. & S. Co.	47.24
May 9	1357 DSS&L	52720	"	"	47.08
" 9	46726 LV	49450	"	"	44.16
" 9	46308 LV	56600	"	"	50.54
" 10	43259 LV	35400	"	"	31.61
" 10	49192 LV	51000	"	"	45.54
" 10	57381 LV	56800	"	"	50.72
" 10	36734 LV	51400	"	"	45.90
" 11	52355 LV	45500	"	"	40.63
" 18	47478 LV	61030	"	"	54.50
" 18	47084 LV	59080	"	"	52.75
" 18	48566 LV	60940	"	"	54.42
" 21	47243 LV	51100	"	"	45.63
" 21	49079 LV	52550	"	"	46.93
" 21	48655 LV	54200	"	"	48.40
" 21	56025 LV	57580	"	"	51.42
" 21	49655 LV	59100	"	"	52.78
" 22	49418 LV	54900	"	"	49.03
" 22	44260 LV	48700	"	"	43.49
" 23	54745 LV	52000	"	"	46.44
" 23	44436 LV	47380	"	"	42.31
" 24	56091 LV	53400	"	"	47.69
" 24	49483 LV	58050	"	"	51.84
" 25	53102 LV	48400	"	"	43.22
" 25	47664 LV	49680	"	"	44.36
" 25	47186 LV	52400	"	"	46.79
" 31	33120 LV	40400	Pottstown, Pa.	Warwick I. & S. Co.	36.08
" 31	47205 LV	50000	"	"	44.65
" 31	47691 LV	50750	"	"	45.34
" 31	44581 LV	47150	"	"	37.64
" 31	46534 LV	50200	"	"	44.83
" 31	49383 LV	49760	"	"	45.44
June 4	46558 LV	48050	"	"	42.91
" 4	48847 LV	55800	"	"	49.83
" 4	48551 LV	49900	"	"	44.56
" 8	49889 LV	50200	"	"	44.83
" 8	44392 LV	43950	"	"	39.25
" 8	52687 LV	55150	"	"	49.25
" 13	56512 LV	57100	Swedeland, Pa.	R. Heckscher & Sons Co.	50.99
" 13	53805 LV	57600	"	"	51.44
" 13	49657 LV	51700	"	"	46.17
" 12	56467 LV	60500	Pottstown, Pa.	Warwick I. & S. Co.	54.03

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Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1907					
" 12	49259 LV	60850	"	"	54.34
" 12	56241 LV	53960	"	"	48.19
" 13	48304 LV	51300	"	"	45.81
" 13	54975 LV	60800	"	"	54.29
" 13	47345 LV	50750	"	"	45.32
" 13	49707 LV	55400	Swedeland, Pa.	R. Heckscher &. S. Co.	49.47
				"	42.60
" 14	54400 LV	47700	"	"	40.29
" 14	47635 LV	45100	"	"	46.79
" 13	48591 LV	52400			
" 20	57329 LV	51350	Pottstown, Pa.	Warwick I. & S. Co.	45.86
				"	44.83
" 20	49449 LV	50200	"	"	39.29
" 20	44167 LV	44000			
" 20	53709 LV	52200	Swedeland, Pa.	R. Heckscher & S. Co.	46.61
June 21	49583 LV	49150	Pottstown, Pa.	Warwick I. & S. Co.	43.89
				"	44.47
" 21	47902 L&NY	49800	"	"	46.96
" 21	49329 LV	52600	"	"	47.51
" 21	47525 LV	53200	"	"	48.80
" 26	49808 LV	54650	"	"	50.19
" 26	53294 LV	56200	"	N. J. Zinc Co.	54.45
" 28	53375 LV	60970	Hazard, Pa.	"	47.84
" 28	49825 LV	53570	"	"	43.67
" 28	45086 LV	48900	"	"	50.32
" 28	57674 LV	56350	"	"	50.63
" 28	52852 LV	56700	"	"	44.51
" 29	44125 LV	49840	"	"	50.32
" 29	49332 LV	56350	"	"	48.22
" 29	47979 LV	54000	"	"	56.03
" 29	46185 LV	62740	"	"	48.96
" 29	53281 LV	54830			
" 29	56383 LV	48500	Pottstown, Pa.	Warwick I. & S. Co.	43.31
				"	54.79
" 29	52666 LV	61350	"	"	52.78
" 29	52653 LV	59100	"	"	49.83
" 29	48665 LV	55800	"	"	43.75
" 27	44176 LV	49000	Hazard, Pa.	N. J. Zinc Co.	47.33
" 27	46279 LV	53000	"	"	
July 1	46795 LV	57800	Catasauqua, Pa.	Crane Iron Works	51.62
				"	47.78
" 1	46325 LV	53500	"	"	50.86
" 1	48165 LV	56950	"	"	
" 1	54709 LV	60250	Pottstown, Pa.	Warwick I. & S. Co.	53.80
				"	50.29
" 1	53913 LV	56320	"	"	43.29
" 1	57486 LV	48480	"	"	51.83
" 1	53056 LV	58040	"	"	
" 1	52737 LV	55500	Catasauqua, Pa.	Crane Iron Works	49.56
" 3	46418 LV	66000	Reading, Pa.	Empire S. & I. Co.	58.94
" 6	48571 LV	58150	"	"	51.93

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Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1907					
" 15	52534 LV	56400	Hazard, Pa.	N. J. Zinc Co.	50.37
" 15	47278 LV	57350	"	"	51.21
" 15	47123 LV	55360	"	"	49.44
" 16	52890 LV	56800	Catasauqua, Pa.	Crane Iron Works	50.72
" 16	52292 LV	56100	"	"	50.10
" 16	47444 LV	59950	"	"	53.54
" 17	46758 LV	51900	"	"	46.35
" 17	40265 LV	39270	Reading,Pa.	Empire S.& I.Co.	35.07
" 17	54888 LV	56100	"	"	50.10
" 11	53237 LV	65500	Newark, N. J.	N. J. Zinc Co.	58.49
" 15	53145 LV	63580	"	"	56.78
" 11	47564 LV	65900	Newark, N. J.	N. J. Zinc Co.	58.85
" 11	54620 LV	65100	"	"	58.13
" 18	52669 LV	58300	Hazard, Pa.	"	52.06
" 18	47604 LV	65900	"	"	58.85
" 18	47281 LV	60050	"	"	53.62
" 18	54295 LV	61400	"	"	54.83
" 22	48838 LV	64600	Swedeland,Pa.	R. Heckscher & S. Co.	57.69
" 22	48023 LV	58170	"	"	51.95
" 22	54250 LV	61250	"	"	54.70
" 22	54031 LV	62350	"	"	55.68
" 22	49495 LV	66000	"	"	58.94
" 22	44350 LV	54800	"	"	48.94
" 22	56802 LV	60900	"	"	54.38
" 22	48685 LV	63200	"	"	56.44
July 24	47986 L&NY	58500	Hazard, Pa.	N. J. Zinc Co.	52.24
" 24	46316 LV	57610	"	"	51.45
" 24	47870 LV	59950	"	"	53.54
" 24	52638 LV	62350	"	"	55.68
" 25	52636 LV	55580	"	"	49.61
" 25	49401 LV	61900	Reading,Pa.	Empire S.& I.Co.	55.28
" 25	46769 LV	60280	"	"	53.83
" 25	54201 LV	63300	"	"	56.53
" 25	47202 LV	58250	"	"	52.02
" 18	54696 LV	62100	Hazard, Pa.	N. J. Zinc Co.	55.46
Aug. 17	52445 LV	60500	"	"	54.03
" 17	48762 LV	50650	"	"	45.23
" 17	54649 LV	61200	"	"	56.65
" 20	57268 LV	50120	"	"	44.76
" 19	49990 LV	53590	"	"	47.86
" 27	36693 LV	42360	"	"	37.83
" 27	47237 LV	58150	"	"	51.93
" 27	46560 LV	58700	"	"	52.42
" 27	33941 LV	41250	"	"	36.84
" 26	54217 LV	55450	"	"	49.52
" 26	47021 LV	54900	"	"	49.03
" 26	47700 LV	52500	"	"	46.88
" 26	49814 LV	53350	"	"	47.64
Sept. 4	56992 LV	59920	"	"	53.51
" 4	56591 LV	62050	"	"	55.41
" 4	45053 LV	41000	"	"	36.61

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Date Shipment	Car No.	Weights	Delivery Point.	Consignees	Freight Paid
1907					
" 4	56201 LV	52300	"	"	46.70
" 5	48393 LV	60980	"	"	54.46
" 5	49533 LV	61620	"	"	55.03
" 5	48863 LV	58820	"	"	52.53
" 6	49862 LV	54370	"	"	48.55
" 6	49772 LV	59100	"	"	52.78
" 6	49757 LV	52200	"	"	46.61
" 12	56429 LV	59500	"	"	53.13
" 12	53464 LV	51300	"	"	45.81
" 13	56172 LV	54250	"	"	48.45
" 13	48993 LV	52250	"	"	46.66
" 13	56236 LV	53500	"	"	47.78
" 13	48255 LV	59500	"	"	53.13
" 13	48918 LV	57930	"	"	51.73
" 13	48817 LV	54640	"	"	48.79
" 14	49662 LV	61400	"	"	54.63
" 14	56292 LV	58300	"	"	52.06
" 17	49109 LV	54140	"	"	48.35
" 17	49060 LV	57700	"	"	51.53
" 17	56894	60950	"	"	54.43
" 17	48887 LV	61150	"	"	54.61
" 17	45028 LV	51700	"	"	46.17
" 20	48822 LV	54050	"	"	48.27
" 20	46767 LV	52600	"	"	46.97
" 27	49643 LV	60150	Newark, N.J.	B. Nicoll & Co.	53.71
" 27	48954 LV	51700	"	"	46.17
" 27	48008 LV	53550	"	"	47.82
" 27	54431 LV	51400	"	"	45.90
" 27	54274 LV	59200	"	"	52.87
Nov. 13	49081 LV	55050	Pottstown, Pa.	Warwick I. & S. Co.	49.16
" 13	48625 LV	55430	"	"	49.50
" 13	49666 LV	63230	"	"	56.46
" 13	49146 LV	56600	Pottstown, Pa.	Warwick I. & S. Co.	50.54
" 13	48203 LV	63100	"	"	56.34
" 13	48030 LV	52900	"	"	47.24
" 13	56351 LV	54550	"	"	48.71
" 13	56693 LV	48760	"	"	43.54
" 13	54008 LV	40970	"	"	36.59
		12358410 lbs. or 5517-320/2240 tons.			$11037.35

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TABLE V.

SHIPMENTS VIA NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

Delivery at destinations made by Philadelphia & Reading R. R. Co.

Date Shipment	Car No.		Weights	Delivery Point	Consignees	Freight Paid
1906						
Nov. 19	47393	NYC&H	65800	Reading, Pa.	Reading Iron Co.	$58.75
" 30	74183	"	80400	Swedeland, Pa.	R. Heckscher & Sons Co.	71.79
" 20	72712	"	88000	Reading, Pa.	Reading Iron Co.	78.57
" 20	13937	LS&MS	66000	"	"	58.93
" 20	73185	NYC&H	86500	"	"	77.23
" 26	47251	"	62700	"	"	55.98
" 30	85415	"	72450	Swedeland, Pa.	R. Heckscher & Sons Co.	64.69
Dec. 1	74550	"	80300	"	"	71.70
" 13	82502	"	87800	"	"	78.39
" 22	71074	"	86900	Reading, Pa.	Reading Iron Co.	77.59
			776850 or 346-1810/2240 tons.			$693.62

TABLE VI.

SHIPMENTS VIA LEHIGH VALLEY RAILROAD COMPANY.

Delivery at destinations by Philadelphia & Reading R. R. Co.

Date Shipment	Car No.		Weights	Delivery Point	Consignees	Freight Paid
1906						
Nov. 17	49027	LV	64100	Reading, Pa.	Reading Iron Co.	$57.24
" 15	54589	LV	62550	"	"	55.86
" 20	57972	LV	66000	"	"	58.93
" 20	33315	LV	44800	"	"	40.00
Dec. 3	56147	LV	65900	Swedeland, Pa.	R. Heckscher & Sons Co.	58.84
" 3	56251	LV	65760	"	"	58.49
" 11	43363	LV	44000	"	"	39.29
" 12	36750	LV	48700	"	"	43.49
" 12	44209	LV	48700	"	"	43.49
" 12	56001	LV	58900	"	"	52.60

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Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1906					
" 14	53574 LV	63750	"	"	58.71
" 14	54964 LV	65150	"	"	58.18
" 14	49117 LV	66000	"	"	58.94
" 13	48987 LV	65450	"	"	58.45
" 19	57649 LV	58950	Swedeland,Pa.	R. Heckscher & Sons Co.	52.64
" 20	57719 LV	55200	"	"	49.29
" 26	48039 LV	47700	Pottstown, Pa.	Warwick I. & S. Co.	42.60
" 26	47577 LV	58200	"	"	51.97
" 24	44313 LV	45350	Temple, Pa.	Temple Iron Co.	40.50
" 24	44295 LV	45700	"	"	40.81
" 24	44277 LV	45200	"	"	40.36
" 31	48825 LV	56000	Pottstown, Pa.	Warwick I. & S. Co.	50.00
" 31	47749 LV	60900	"	"	54.38
" 31	54370 LV	65060	"	"	58.10
" 31	48144 LV	63500	"	"	56.70
		1433520 lbs. or 639-2160/2240 tons.			$1279.86

TABLE VII.

SHIPMENTS VIA BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY.

Delivery at destinations made by Philadelphia & Reading R. R. Co.

Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1906					
Mch. 1	7227 BR&P	61600	Emaus,Pa.	Reading Iron Co.	$55.00
" 2	704 S. L.	50800	Pottstown, Pa.	Warwick I. & S. Co.	45.36
" 8	7280 BR&P	59400	"	"	53.04
" 9	15063 BR&P	68500	"	"	61.16
" 9	11572 BR&P	45600	"	"	40.71
" 12	8125 BR&P	65400	"	"	58.39
" 12	12981 BR&P	88700	"	"	79.20
" 15	15892 BR&P	70900	"	"	63.30
" 16	10159 BR&P	59350	Emaus,Pa.	Reading Iron Co.	52.99
" 21	540 S. L.	54800	"	"	48.93
" 23	7417 BR&P	62100	"	"	55.45
" 23	7579 BR&P	60900	"	"	54.38
" 23	7728 BR&P	47300	"	"	42.23
" 31	6951 BR&P	62440	"	"	55.75

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Table of Shipments.

Date Shipment	Car No.	Weights	Delivery Point	Consignees	Freight Paid
1906					
April 11	6866 BR&P	57850	Temple, Pa.	Temple Iron Co.	51.65
" 13	7711 BR&P	56760	"	"	50.68
" 12	5067 BR&P	55080	"	"	49.18
" 14	7508 BR&P	46600	"	"	41.61
May 9	7973 BR&P	56500	"	"	50.45
" 10	7286 BR&P	64400	"	"	57.50
" 8	7413 BR&P	57500	"	"	51.34
" 11	7303 BR&P	59500	"	"	53.12
" 12	6922 BR&P	64200	"	"	57.32
" 15	5477 BR&P	50740	"	"	45.30
June 12	5705 BR&P	58230	"	"	51.99
" 13	7321 BR&P	60150	"	"	53.71
" 13	9337 BR&P	67700	Temple, Pa.	Temple Iron Co.	60.45
" 15	5505 BR&P	59500	"	"	53.13
" 23	7696 BR&P	54850	"	"	48.97
" 25	5201 BR&P	66000	"	"	58.93
" 25	7510 BR&P	53000	"	"	47.32
" 25	5263 BR&P	65650	"	"	58.62
July 11	5579 BR&P	63400	Emaus, Pa.	Reading Iron Co.	56.61
" 12	5367 BR&P	66500	"	"	59.38
" 13	5400 BR&P	64840	"	"	57.89
" 13	6838 BR&P	61900	"	"	55.27
" 25	23283 P&R	57610	"	"	51.44
Aug. 1	7539 BR&P	65670	"	"	58.63
" 1	7386 BR&P	64200	"	"	57.32
" 4	453 S. L.	52850	"	"	47.19
" 6	7503 BR&P	66000	"	"	58.93
" 5	7907 BR&P	66000	"	"	58.93
" 8	5694 BR&P	65900	"	"	58.84
" 8	7779 BR&P	64900	"	"	57.95
" 10	20118 P&R	45360	"	"	40.50
" 10	7970 BR&P	46150	"	"	41.21
" 14	6820 BR&P	70000	"	"	62.50
" 15	7300 BR&P	57650	"	"	51.47
" 15	80577 CRRNJ	63080	"	"	56.32
" 17	6357 BR&P	71300	"	"	63.66
" 16	5765 BR&P	71160	"	"	63.54
" 16	7468 BR&P	44860	"	"	40.05
" 16	7329 BR&P	57800	"	"	51.61
" 17	773 BR&P	62500	"	"	55.80
" 22	7821 BR&P	59970	"	"	53.54
Sept. 22	7230 BR&P	61700	Reading Pa.	Reading Iron Co.	55.09
" 24	7227 BR&P	63150	"	"	56.38
" 24	7376 BR&P	60000	"	"	53.57
" 25	7411 BR&P	61200	"	"	54.64
" 27	5449 BR&P	67050	Pottstown, Pa.	Warwick I. & S. Co.	59.87
" 23	7587 BR&P	66000	Pottstown, Pa.	Warwick I. & S. Co.	58.93
" 29	7481 BR&P	61400	"	"	54.82
" 29	7695 BR&P	60300	"	"	53.84
Oct. 2	7208 BR&P	64050	"	"	57.19

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Date Shipment		Car No.		Weights	Delivery Point	Consignees	Freight Paid
1906					"	"	43.84
"	1	7520	BR&P	49100			
"	2	6838	BR&P	59700	Temple, Pa.	Temple Iron Co.	53.30
"	5	7377	BR&P	65600	"	"	58.57
"	5	5444	BR&P	68400	"	"	61.07
"	8	7982	BR&P	50060	"	"	44.70
"	13	7526	BR&P	53300	"	"	47.59
"	17	7455	BR&P	60200	"	"	53.75
"	18	7425	BR&P	66000	"	"	58.93
"	18	7617	BR&P	63750	"	"	56.96
"	19	88373	CRRNJ	75300	"	"	67.23
"	19	23374	P&R	77500	"	"	69.20
"	20	21813	P&R	48790	"	"	43.56
"	20	88070	CRRNJ	84800	"	"	75.71
"	20	80542	CRRNJ	80150	"	"	71.56
"	23	5781	BR&P	69650	Reading, Pa.	Reading Iron Co.	62.19
"	25	7140	BR&P	68150	"	"	60.85
"	25	10870	BR&P	45900	"	"	40.98
"	26	11064	BR&P	50800	"	"	45.36
"	27	23103	P&R	77000	"	"	68.75
"	30	9157	BR&P	61650	"	"	55.04
"	29	8273	BR&P	62850	"	"	56.12
"	31	80399	CRRNJ	63580	"	"	56.77
Nov.	1	8959	BR&P	52600	"	"	46.97
"	1	7314	BR&P	55600	"	"	49.64
"	2	6017	BR&P	57450	"	"	51.29
"	9	6891	BR&P	58350	"	"	52.10
"	12	15680	BR&P	63800	"	"	56.96
"	13	767	S. L.	50200	"	"	44.82
"	15	9789	BR&P	64500	"	"	57.59
"	16	9619	BR&P	63200	"	"	56.47
"	20	482	S. L.	55000	"	"	49.11
"	23	16267	BR&P	65200	"	"	58.21
"	23	7721	BR&P	65100	"	"	58.12
"	23	9103	BR&P	63800	"	"	58.75
"	23	7751	BR&P	60300	"	"	53.84
"	26	11326	BR&P	52150	"	"	46.56
Dec.	11	7176	BR&P	62630	Swedeland, Pa.	R. Heckscher & Sons Co.	55.92
"	17	10199	BR&P	70700	"	"	63.13
"	17	7083	BR&P	70200	"	"	62.68
"	21	5882	BR&P	64300	"	"	57.41
				6385760 lbs. or 2850-1760/2240 tons			$5701.67

30 EXHIBIT "B."

No. 1511.

NAYLOR & COMPANY
vs.
LEHIGH VALLEY RAILROAD COMPANY et al.

Submitted November 25, 1908; Decided January 5, 1909.

Defendants' rate on pyrites cinder should not exceed their rate on iron ore from Buffalo, N. Y., to points in Pennsylvania and New Jersey. Reparation denied.

Douglas, Leckie & Thompson for complainant.
Charles Heebner and J. D. Campbell for Philadelphia & Reading Railway Company.
Henry W. Clark for Lehigh Valley Railroad Company.
Henry Wolf Bickle for Pennsylvania Railroad Company.
Harris, Havens, Beach & Harris for Buffalo, Rochester & Pittsburg Railway Company.
Edgar H. Boles for New York Central & Hudson River Railroad Company.
J. D. Campbell for Philadelphia & Reading Railway Company.
J. L. Seager for Delaware, Lackawanna & Western Railroad Company.

Report of the Commission.

LANE, *Commissioner:*

This complaint involves the reasonableness of the rate of $2 per gross ton on pyrites cinder over the lines of defendant companies from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey.

31 Iron pyrites is a high-grade ore containing a large percentage of both sulphur and metallic iron. It is imported, chiefly from Spain, by fertilizer and chemical works located in this country. At these works this ore is burned in specially constructed furnaces, and from the arising sulphuric fumes sulphuric acid is obtained. The resultant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore. This pyrites cinder, the rate upon which complainants claim to be excessive, is shipped to blasting furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron. It is alleged by the complainants that pyrites cinder being a low-grade commodity, valued at about $1 per gross ton at Buffalo, is unable to move at the $2 per ton rate; the output at the chemical works at Buffalo being from 20,000 to

25,000 tons per year, only one-quarter of which is sold. Pyrites cinder is also produced at chemical works at Bayonne, N. J., where it is valued at $2 per ton, the difference between the value at Buffalo and the value at Bayonne being, it is claimed, accounted for because of the difference in freight rate to points of destination in New Jersey and Pennsylvania. This fact is emphasized by said complainants that the iron pyrites bears a rate from New York, Philadelphia and Baltimore to Buffalo of but $1.40 per ton, while the pyrites cinder for a return haul of but a part of the distance bears a rate of $2 per ton, the cheaper commodity for a shorter haul being charged a greater amount than the higher grade commodity for a longer haul.

The contention of the defendants by way of answer is that pyrites cinder should take a higher rate than iron ore between the same points, owing to the longer time consumed in loading the former than the latter, and because iron ore is consumed in greater
32 quantities than pyrites cinder. It appears that it does in fact take much less time to load iron ore than pyrites cinder, and a carload of iron ore is slightly heavier than a load of pyrites cinder. The rate on iron ore is $1.45 per ton to points of destination carrying a $2 rate on pyrites cinder.

We are of the opinion that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded.

15 I. C. C. Rep.

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 5th Day of January, A. D. 1909.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1511.

NAYLOR & COMPANY

v.

LEHIGH VALLEY RAILROAD COMPANY, PENNSYLVANIA RAILROAD Company, Buffalo, Rochester & Pittsburg Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, and Delaware, Lackawanna & Western Railroad Company.

This case being at issue upon complaint and answers on
33 file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon;

It is ordered, That the above-named defendant carriers be, and they are hereby, notified and required to establish and put in force on or before the 25th day of February, 1909, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of pyrites cinder, in carloads, from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey, no higher rates than are in force over their lines on iron ore between said points. Said rates may be made effective upon three days' notice to the public and to the Interstate Commerce Commission, given in the manner required by law, and the tariffs must contain notation that they are issued under the authority hereby granted and must refer to the title and number of this case.

It is further ordered, That complainant's claim for reparation in this proceeding be, and the same is hereby, disallowed.

I, Judson C. Clements, Chairman of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission, are true copies of the originals now on file in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission, this 25th day of May, 1911.

[SEAL.] JUDSON C. CLEMENTS, *Chairman.*

Report.

34 EXHIBIT "C."

No. 1511.

NAYLOR & COMPANY

v.

LEHIGH VALLEY RAILROAD COMPANY et al.

Submitted May 6, 1910. Decided June 2, 1910.

Reparation awarded for the collection of unreasonable charges on shipments of pyrites cinder from Buffalo, N. Y., to points in Pennsylvania and New Jersey.

Thompson & Van Sant for complainant.

Edgar H. Boles for Lehigh Valley Railroad Company; Delaware, Lackawanna & Western Railroad Company; New York Central & Hudson River Railroad Company; and Philadelphia & Reading Railway Company.

James S. Havens and Samuel M. Havens for Buffalo, Rochester & Pittsburg Railway Company.

Report of the Commission on Rehearing.

LANE, *Commissioner:*

In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the de-

fendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. Naylor & Co. v. L. V. R. R. Co., 15 I. C. C. Rep., 9.

Pursuant to the Commission's order the defendants reduced
35 the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.

We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations. Detroit Chemical Works v. N. C. Ry. Co., 13 I. C. C. Rep., 357; Same v. Erie R. R. Co., 13 I. C. C. Rep., 363.

The Buffalo, Rochester & Pittsburg Railway Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,846.55, with interest from November 21, 1907, as reparation for the collection of unreasonable charges on 189 carloads of pyrites cinder aggregating 5,175-1590/2240 tons in weight moving from Buffalo to various Pennsylvania points.

The New York Central & Hudson River Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $248.93, with interest from April 19, 1907, as reparation for the collection of unreasonable charges on 13 carloads of pyrites cinder aggregating 452-1370/2240 tons in weight, moving from Buffalo to various Pennsylvania points.

The Delaware, Lackawanna & Western Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $487.52, with interest from September 23, 1907, as reparation for the collection of unreasonable charges on 31 carloads of pyrites cinder aggregating 886-960/2240 tons in weight, moving from Buffalo to Newark, N. J.

The Lehigh Valley Railroad Company and the Central
36 Railroad Company of New Jersey will be required to refund to the complainant $1,024.15, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 74 carloads of pyrites cinder aggregating 1,862-220/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

The Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,362.23, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 172 carloads of pyrites cinder aggregating 4,295-20/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

It will be ordered accordingly.

37 *Order.*

At a general session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 2nd day of June, A. D. 1910.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1511.

NAYLOR & COMPANY
v.
LEHIGH VALLEY RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY, THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PHILADELPHIA & READING RAILWAY COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, AND THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

This case being at issue upon motion for rehearing on reparation, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is made a part hereof:

It is ordered, That defendants Buffalo, Rochester & Pittsburgh Railway Company and Philadelphia & Reading Railway
38 Company be, and they are hereby authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $2,846.55, with interest thereon at the rate of 6 per cent. per annum from November 21, 1907, as reparation for an unreasonable rate charged for the transportation of 189 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendants, The New York Central & Hudson River Railroad Company and Philadelphia & Reading Railway Company be, and they are hereby authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $248.93 with interest thereon at the rate of 6 per cent. per annum from April 19, 1907, as reparation for an unreasonable rate charged for the transportation of 13 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendants The Delaware, Lackawanna & Western Railroad Company and The Central Railroad Company of New Jersey, be and they are hereby authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $487.52, with interest thereon at the rate of 6 per cent. per annum from September 23, 1907, as reparation for an unreasonable rate charged for the transportation of 31 carloads of pyrites cinder from Buffalo, N. Y., to Newark, N. J., which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

39 It is further ordered, That defendants, Lehigh Valley Railroad Company and The Central Railroad Company of New Jersey be, and they are hereby authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $1,024.15, with interest thereon at the rate of 6 per cent. per annum from November 13, 1907, as reparation for an unreasonable rate charged for the transportation of 74 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania and New Jersey, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

And it is further ordered, That defendants, Lehigh Valley Railroad Company and Philadelphia & Reading Railway Company, be and they are hereby authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $2,362.23, with interest thereon at the rate of 6 per cent. per annum from November 13, 1907, as reparation for an unreasonable rate charged for the transportation of 172 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania and New Jersey, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

I, Judson C. Clements, Chairman of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission, are true copies of the originals now on file in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 25th day of May, 1911.

[SEAL.] JUDSON C. CLEMENTS, *Chairman.*

40 ***Plea.***

Filed June 14, 1911.

Philadelphia and Reading Railway Company, one of the defendants in the above entitled case pleads "Not Guilty".

JOHN G. LAMB,
Attorney for Philadelphia and Reading Railway Company.

June 13, 1911.

Plea.

Filed June 22, 1911.

The Delaware, Lackawanna & Western Railroad Company, one of the above-named defendants, pleads "Not Guilty".

JAMES F. CAMPBELL,
Att'y for D., L. & W. R. R. Co.

Plea.

Filed June 17, 1911.

The defendants, the Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railroad Company and New York Central and Hudson River Railroad Company, plead "Not Guilty".

JOHN G. JOHNSON,
Attorney for said Defendants,
Per J. W. BAYARD.

June 12th, 1911.

To Henry B. Robb, Esq., Clerk United States Circuit Court.

41 *Jury.*

And afterwards, to wit: on the 21st day of October, 1912, a jury, being called came, to wit:

William J. Koch,	William J. Pennington,
Harry F. Seiber,	Ernest W. Hermann,
Franklin H. Bean,	J. P. Dalby,
J. M. Pullinger,	Edward K. Ketchum,
Elmer D. Hartzell,	H. D. Hertzler,
Walter S. McIlvain,	Emanuel P. Hostetter,

who were respectively sworn or affirmed to try the issue joined.

Verdict.

And afterwards, to wit: on the 21st day of October, 1912, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiffs and against defendants as follows:

Buffalo, Rochester & Pittsburgh Railway Co. and the Philadelphia & Reading Railway Company.....	$3684.51
New York Central & Hudson River R. R. Co. and Philadelphia & Reading Railway Company.....	331.08
Delaware, Lackawanna & Western R. R. Co. and Central R. R. of N. J.....	633.79
Lehigh Valley Railroad Company and Central Railroad of New Jersey.....	1329.40
Lehigh Valley Railroad Company and Philadelphia & Reading Railway Company.....	3065.76

42 *Bill of Exceptions.*

Be it Remembered that at the said Sessions of April, 1911, came the said plaintiffs into the said Court and impleaded the said defendants in a certain plea of trespass, etc., in which the said plaintiffs declared prout narr and the said defendants pleaded "not guilty," and thereupon issue was joined between them.

And afterwards, to wit, at a Session of said Court held in the district aforesaid, before the Honorable James B. Holland, Judge of the said Court, the twenty-first day of October, A. D. 1912, the aforesaid issue between the said parties came on to be tried by a jury of the said district for that purpose duly impaneled prout list of jurors, at which date came as well the said plaintiffs as the said defendants by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called came and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiffs offered evidence as follows:

Jury sworn October 21st, 1912.

Plaintiff's Evidence.

PHILIP L. SMITH, having been duly sworn, was examined and testified as follows:

By Mr. GABLE:

Q. What is your residence?
A. Maplewood, New Jersey.
Q. What is your business?
A. I am in the employ of Naylor & Company.
Q. The plaintiffs in this case?
A. Yes, sir.

Q. They are the same parties, are they, who presented a
43 complaint before the Interstate Commerce Commission, No. 1511, on the docket of that Commission?

A. Yes, sir.
Q. At Washington?
A. Yes, sir.
Q. Have you knowledge whether the orders of reparation have been complied with and the moneys paid to Naylor & Company?
A. Yes, sir.
Q. Have they or have they not been paid?
A. They have not been paid.
Q. Who compose the firm of Naylor & Company?
A. Mr. J. Mitchell Clark, the senior member; Mr. William H. Mills and Mr. J. Armstrong Rawlins.

No cross-examination.

Mr. GABLE: We offer in evidence report and order of the Interstate Commerce Commission, Opinion No. 746, in case No. 1511, in the

matter of Naylor & Company vs. The Lehigh Valley Railroad Company et al., embracing a report and an order duly certified under the Act of Congress, decided January 5, 1909.

We likewise offer in evidence the report and order of the Commission on a later hearing in the same matter, being Unreported Opinion No. 168, decided June 2, 1910, duly certified.

Mr. DRINKER: We object to the admission of these reports on two main grounds, and also on other relevant grounds.

We object mainly because the Act of Congress requires, under Section 14, that in cases where the Commission awards damages it shall find the facts on which its award is based, and in Section 16 of the Act the report and order of the Commission may be prima facie evidence as to the facts found. In these reports the
44 Commission does not find the facts on which they base their order but merely summarizes the evidence and proofs.

My second objection is on the ground that these cases were virtually discrimination cases. The order was based not on the fact that the rate was in itself unreasonable, but it was based on the difference between the iron rate on the iron ore and the pyrites cinder rate, and the Commission has no power to award damages in discrimination cases; only in plain rate cases.

(Mr. Drinker read Sections 14 and 16.)

Mr. GABLE: I submit that if the order and decree should, by any process or construction, fail to find facts, that would not be an objection to the admission of the order and the finding. The Act says that the orders of the Commission and findings shall be prima facie evidence of the facts found. When we proffer the order, duly certified according to the Act of Congress, that cannot be objected to, as to its going in evidence. It is for the Court then, when it is offered, to pass upon the sufficiency of the findings of the facts that are contained in the order, but to raise an objection that it cannot go before the Court because the Court may possibly construe that there are not sufficient findings of fact is not a valid objection to the admission. We come afterwards to the consideration by the Court as to what facts are found, and the Court would instruct the jury as to what the findings are, what they amount to, but I submit that there can be no valid objection to the reception in evidence of these, the Court afterwards to pass upon the sufficiency, what credit shall be given to them.

The COURT: The trouble about that is, as I understand, Section 16 says that the facts found shall be prima facie evidence, and Section 14 provides that the facts shall be found. Now, if it is
45 to be prima facie evidence the facts must be found, according to the requirement of Section 14. I do not see how the reports can be admitted as prima facie evidence if they are not based upon a proper finding. Of course, we cannot stop you from bringing it before the Court. You have got it before the Court now, but the question is whether it is to be admitted to make out a prima facie case for you. That is the question.

Mr. GABLE: Advancing right to that point, the order of the Commission was:

"We now find that the rate of $2.00 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the Statute of Limitations."

There certainly is a finding of fact, that there was an unreasonable rate, and that the complainant was entitled to reparation upon all the shipments within the statutory period. They they go on and specify how much shall be paid by each of the carriers, based upon the shipments as shown before the Commission. I submit that there is a finding of fact by the Commission, and we rest upon that.

I would like to call your Honor's attention to a case that was reported in 190 Federal Reporter, a Quincy Railway case, in which it was held that it was not error to admit the Interstate Commerce Commission's order and report, even if it should contain irrelevant matter. That was recently decided.

The COURT: That might be, but it would have to contain
46 enough, but if it contains more than enough that is irrelevant, that does not matter. The admission of irrelevant matter does not help a report if it is deficient. However, I think the order finds the facts. It states exactly what the calculation is made on against the Buffalo, Rochester and Pittsburgh Railway Company, 189 carloads of pyrites cinder, and so on through the whole list of railroads that charged this excessive freight. They also find that $2.00 a ton is excessive, and that $1.45 per ton is a proper charge for the transportation for this kind of merchandise, and then they find the amount due and upon what it is due.

The objection to the admission of the reports is overruled.

(Exception noted for defendants by direction of the Court.)

The reports are as follows:

"*Opinion No.* 746.

Before the Interstate Commerce Commission.

No. 1511.

NAYLOR & COMPANY
vs.
LEHIGH VALLEY RAILROAD COMPANY et al.

Submitted November 25, 1908; Decided January 6, 1909.

Douglas, Leckie & Thompson for complainant.

Charles Heebner and J. D. Campbell for Philadelphia & Reading Railway Company.

Henry W. Clark for Lehigh Valley Railroad Company.
47 Henry Wolf Bikle for Pennsylvania Railroad Company.

Harris, Havens, Beach & Harris for Buffalo, Rochester & Pittsburgh Railway Company.

Edgar H. Boles for New York Central & Hudson River Railroad Company.
J. D. Campbell for Philadelphia & Reading Railway Company.
J. L. Seager for Delaware, Lackawanna & Western Railroad Company.

Report and Order of the Commission.

NAYLOR & CO.
VS.
LEHIGH VALLEY R. R. CO.

No. 1511.

NAYLOR & COMPANY
VS.
LEHIGH VALLEY RAILROAD COMPANY et al.

Submitted November 25, 1908; Decided January 5, 1909.

Defendants' rate on pyrites cinder should not exceed their rate on iron ore from Buffalo, N. Y., to points in Pennsylvania and New Jersey. Reparation denied.

Douglas, Leckie & Thompson for complainant.
Charles Heebner and J. D. Campbell for Philadelphia & Reading Railway Company.
Henry W. Clark for Lehigh Valley Railroad Company.
Henry Wolfe Bikle for Pennsylvania Railroad Company.
Harris, Havens, Beach & Harris for Buffalo, Rochester and Pittsburgh Railway Company.
Edgar H. Boles for New York Central & Hudson River Railroad Company.
48 J. D. Campbell for Philadelphia & Reading Railway Company.
J. L. Seager for Delaware, Lackawanna & Western Railroad Company.

Report of the Commission.

LANE, *Commissioner:*

This complaint involves the reasonableness of the rate of $2 per gross ton on pyrites cinder over the lines of the defendant companies from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey.

Iron pyrites is a high-grade ore containing a large percentage of both sulphur and metallic iron. It is imported, chiefly from Spain, by fertilizer and chemical works located in this country. At these works this ore is burned in specially constructed furnaces, and from the arising sulphuric fumes sulphuric acid is obtained. The result-

ant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore. This pyrites cinder, the rate upon which complainants claim to be excessive, is shipped to blasting furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron. It is alleged by the complainants that pyrites cinder being a low-grade commodity, valued at about $1 per gross ton at Buffalo, is unable to move at the $2 per ton rate; the output at the chemical works at Buffalo being from 20,000 to 25,000 tons per year, only one-quarter of which is sold. Pyrites cinder is also produced at chemical works in Bayonne, N. J., where it is valued at $2 per ton, the difference between the value at Buffalo and the value at Bayonne being, it is claimed, accounted for because of the difference in freight rate to points of destination in New Jersey and Pennsylvania. This fact is emphasized by complainants that the
49 iron pyrites bears a rate from New York, Philadelphia and Baltimore to Buffalo of but $1.40 per ton, while the pyrites cinder for a return haul of but a part of the distance bears a rate of $2 per ton, the cheaper commodity for a shorter haul being charged a greater amount than the higher grade commodity for a longer haul.

The contention of the defendants by way of answer is that pyrites cinder should take a higher rate than iron ore between the same points, owing to the longer time consumed in loading the former than the latter, and because iron ore is consumed in greater quantities than pyrites cinder. It appears that it does in fact take much less time to load iron ore than pyrites cinder, and a carload of iron ore is slightly heavier than a load of pyrites cinder. The rate on iron ore is $1.45 per ton to points of destination carrying a $2 rate on pyrites cinder.

We are of the opinion that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded.

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the Fifth Day of January, A. D. 1909.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

50 No. 1511.

NAYLOR & COMPANY
vs.
LEHIGH VALLEY RAILROAD COMPANY, PENNSYLVANIA RAILROAD Company, Buffalo, Rochester & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, and Delaware, Lackawanna & Western Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon;

It is Ordered, That the above-named defendant carriers be, and they are hereby notified and required to establish and put in force on or before the twenty-fifth day of February, 1909, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of pyrites cinder, in carloads, from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey, no higher rates than are in force over their lines on iron ore between said points. Said rates may be made effective upon three days' notice to the public and to the Interstate Commerce Commission, given in the manner required by law, and the tariffs must contain notation that they are issued under the authority hereby granted and must refer to the title and number of this case.

It is Further Ordered, That complainants' claim for reparation in this proceeding be, and the same is hereby disallowed.

[SEAL.]

51 Interstate Commerce Commission,

Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the report and order of the Commission entered January 5,

1909, in the case of Naylor & Company vs. Lehigh Valley Railroad Company and others, Docket No. 1511, the original of which is now on file and of record in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this eighteenth day of October, 1912.

[SEAL.] JOHN H. MARBLE, *Secretary.*"

"Unreported Opinion, No. 168.

Before the Interstate Commerce Commission.

No. 1511.

NAYLOR & COMPANY
vs.
LEHIGH VALLEY RAILROAD COMPANY et al.

Decided June 2, 1910.

Report and Order of the Commission on Rehearing.

No. 1511.

NAYLOR & COMPANY
vs.
LEHIGH VALLEY RAILROAD COMPANY et al.

52 Submitted May 6, 1910. Decided June 2, 1910.

Reparation awarded for the collection of unreasonable charges on shipments of pyrites cinder from Buffalo, N. Y., to points in Pennsylvania and New Jersey.

Thompson & Van Sant for complainant.

Edgar H. Boles for Lehigh Valley Railroad Company, Delaware, Lackawanna & Western Railroad Company, New York Central & Hudson River Railroad Company, and Philadelphia & Reading Railway Company.

James S. Havens and Samuel M. Havens for Buffalo, Rochester & Pittsburgh Railway Company.

Report of the Commission on Rehearing.

LANE, *Commissioner:*

In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey the rate was found excessive and the defendants were ordered to establish a rate

not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied.

Naylor & Co. vs. L. V. R. R., *No.* 151 C. C. Rep. 9.

Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.

We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the
53 subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the Statute of Limitations. Detroit Chemical Works *vs.* N. C. Ry. Co., 13 I. C. C., Rep. 357; Same vs. Erie R. R. Co., 13 I. C. C. Rep., 363.

The Buffalo, Rochester & Pittsburgh Railway Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,846.55, with interest from November 21, 1907, as reparation for the collection of unreasonable charges on 189 carloads of pyrites cinder aggregating 5,175 1590/2240 tons in weight, moving from Buffalo to various Pennsylvania points.

The New York Central & Hudson River Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $248.93 with interest from April 19, 1907, as reparation for the collection of unreasonable charges on thirteen carloads of pyrites cinder aggregating 452 1370/2240 tons in weight, moving from Buffalo to various Pennsylvania points.

The Delaware, Lackawanna & Western Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainants $487.52, with interest from September 23, 1907, as reparation for the collection of unreasonable charges on thirty-one carloads of pyrites cinder aggregating 886 960/2240 tons in weight, moving from Buffalo to Newark, N. J.

The Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $1,024.15, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on seventy-four carloads of pyrites cinder, aggregating 1,862 220/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

The Lehigh Valley Railroad Company and the Philadel-
54 phia & Reading Railway Company will be required to refund to the complainant $2,362.23, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 172 carloads of pyrites cinder aggregating 4,295 20/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

It will be ordered accordingly.

Order.

At a General Session of the Interstate Commerce Commission, Held at its Office, in Washington, D. C., on the Second Day of June, A. D. 1910.

Present:

Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1511.

NAYLOR & COMPANY
vs.
LEHIGH VALLEY RAILROAD COMPANY, THE PENNSYLVANIA RAILroad Company, Buffalo, Rochester & Pittsburgh Railway Company, The New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, The Central Railroad Company of New Jersey, and The Delaware, Lackawanna & Western Railroad Company.

This case being at issue upon motion for rehearing on reparation, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is made a part hereof.

It is Ordered, That defendants Buffalo, Rochester & Pittsburgh Railway Company and Philadelphia & Reading Railway Company be, and they are hereby authorized and directed on or before the first day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $2,846.55, with interest thereon at the rate of 6 per cent. per annum from November 21, 1907, as reparation for an unreasonable rate charged for the transportation of 189 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

It is Further Ordered, That defendants The New York Central & Hudson River Railroad Company and Philadelphia & Reading Railway Company be, and they are hereby authorized and directed on or before the first day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $248.93, with interest thereon at the rate of 6 per cent. per annum from April 19, 1907, as reparation for an unreasonable rate charged for the transportation of thirteen carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

It is Further Ordered, That defendants The Delaware, Lackawanna & Western Railroad Company and The Central Railroad Company of New Jersey be, and they are hereby authorized and directed on or before the first day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $487.52, with interest thereon at the rate of 6 per cent. per annum from September
56 23, 1907, as reparation for an unreasonable rate charged for the transportation of thirty-one carloads of pyrites cinder from Buffalo, N. Y., to Newark, N. J., which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by report of the Commission.

It is Further Ordered, That defendants, Lehigh Valley Railroad Company and The Central Railroad Company of New Jersey be, and they are hereby authorized and directed, on or before the first day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $1,024.15, with interest thereon at the rate of 6 per cent. per annum from November 13, 1907, as reparation for an unreasonable rate charged for the transportation of seventy-four carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania and New Jersey, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

And It is Further Ordered, That defendants, Lehigh Valley Railroad Company and Philadelphia & Reading Railway Company, be and they are hereby authorized and directed, on or before the first day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $2,362.23, with interest thereon at the rate of 6 per cent. per annum from November 13, 1907, as reparation for an unreasonable rate charged for the transportation of 172 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania and New Jersey, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

[SEAL.]

57 Interstate Commerce Commission, Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the report and order of the Commission on rehearing, entered June 2, 1910, in the case of Naylor & Company vs. Lehigh Valley Railroad Company, and others, Docket No. 1511, the original of which is now on file and of record in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this eighteenth day of October, 1912.

[SEAL.] JOHN H. MARBLE, *Secretary.*"

Plaintiff rests.

Defendants offered no evidence.

Defendants' counsel moved for binding instructions in favor of the defendant.

Mr. GABLE: We ask in this case, if the Court please, in addition to the amount claimed, an allowance of a reasonable counsel fee, as provided for by the Act of Congress. That provision is in Section 16, paragraph 2, in which the Act provides that if the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. That has been affirmed in the case of the Louisville & Nashville Railroad Company vs. Dickison, 191 Fed. Rep., 705.

Mr. BAYARD: As we understand that, the matter of the fee shall be determined by the Court upon the conclusion of the case. I do not think that goes before the jury at present at all.

58 Mr. THOMPSON: That is for the Court.

Mr. GABLE: It is entirely for the Court, but we wanted to save our position on it. Your Honor, we are in this case blazing the way, I think. I have not found in the books any jury trial on an order. It seems to me that if we finally prevail we will finally prevail in the judgment that will be entered here to-day. It is not a judgment that will be entered some time in the future that will be affirmed, but it is the verdict and the judgment upon it here. Likewise, the attorney's fee should be fixed as part of the costs, just as the amount of the verdict is fixed in your Honor's Court, and it is a matter for the judgment of your Honor, at this stage of the proceeding, and if that is affirmed, it is affirmed just as the verdict is that may be rendered here to-day, and collected as part of the costs. We will finally prevail in an affirmance of that judgment, if there should be an appeal taken, but it will not be fixed there, I submit, but should be fixed here.

Mr. BAYARD: My idea with regard to that is simply this: To-day there is a verdict. That is not a judgment. It may never ripen into a judgment. When the judgment is entered in this Court I suppose the Court will also fix the fee, but I do not think it should be fixed before the actual entry of judgment, which would not be before the jury in any possible aspect.

Mr. THOMPSON: That is all we ask.

Charge of the Court.

Hon. JAMES B. HOLLAND, *J.*:

GENTLEMEN OF THE JURY: The Interstate Commerce Act of 1887, and its supplements, provide that whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of

59 the Commission, together with its decision, order or requirement in the premises, and in case damages are awarded such report shall include the findings of fact on which the award is made.

Under and by reason of the authority found in that section Naylor & Company brought suit against six railway companies, making

them all defendants in one suit, to recover damages which the Interstate Commerce Commission awarded this plaintiff against the various companies for an alleged illegal collection of charges, which the railroad companies collected from Naylor & Company for the transportation of a certain kind of ore from Buffalo to various points in Pennsylvania and New Jersey, namely, Pottstown, Lazare, Swedeland, Temple, Reading, Catasauqua and Emaus, in Pennsylvania, and Newark and Phillipsburg, in New Jersey. Their complaint was presented to the Interstate Commerce Commission, and the final report of that commision was to the effect that these railroads had charged Naylor & Company an excess for the transportation of this ore from Buffalo to the points I have mentioned.

It appears from the report that the railroad companies charged Naylor & Company $2 a ton to carry this particular class of ore from Buffalo to these points, and that it was charging $1.45 per ton on another kind of ore, and the Commission found, as a matter of fact, that it was charging this plaintiff an excess amounting to the difference between $1.45 a ton and $2.00 a ton, and then proceeded to an examination of the number of tons which each railroad had transported for this plaintiff company at this excessive rate, and awarded the plaintiff an amount equal to the excess which the Commission found the respective railroads had collected from the plaintiff, as follows:

Against the Buffalo, Rochester and Pittsburgh Railway Company and the Philadelphia and Reading Railway Company,
60 $2,846.55, with interest from November 21st, 1907; against the New York Central and Hudson River Railroad Company and Philadelphia and Reading Railway Company, $248.93, with interest from April 19th, 1907; against The Delaware, Lackawanna & Western Railroad Company and The Central Railroad Company of New Jersey, $487.52, with interest from September 23, 1907; against The Lehigh Valley Railroad Company and The Central Railroad Company of New Jersey, $1,024.15, with interest from November 13th, 1907; and against The Lehigh Valley Railroad Company and The Philadelphia & Reading Railway Company, $2,362.23, with interest from November 13th, 1907.

These amounts were awarded by the Commission against these railroads in favor of the plaintiff.

The plaintiff has submitted to you evidence to establish the fact that these railroads have not, up to this time, paid these awards. They also submit to you the reports of the Interstate Commerce Commission, for the purpose of showing that that finding was made by the Commission, and that these awards in favor of the plaintiff were made against these railroad companies. This same Act of 1887, the Interstate Commerce Act, Section 16, says that such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and the order of the Commission shall be prima facie evidence of the facts therein stated. You will notice that the Act of Congress says that the findings of the Commission shall be prima facie evidence of the facts therein stated. In the report the facts stated are, as I read them to you,

that is, the Commission finds that $2 a ton is an excessive charge on this ore, and it is excessive to the extent of the difference between $1.45 per ton and $2.00 per ton; and then it proceeds to state the number of tons that each of the railroads carried for the plaintiff at that excessive amount, and awards an amount to the plaintiff
61 equal to the amount of the excessive charge on the number of tons carried. That is to say, it has found that these railroads owe this plaintiff the amount of money stated, and found in the report, because of the fact that the railroads charged them excessive freight. The Act says that that shall be prima facie evidence. That means that it shall be established, prima facie, the facts therein contained unless contradicted or explained. The defendants have offered no evidence whatever, and leave the record as to the evidence the same as it was when the plaintiff closed its case. You have nothing, then, before you except that the Interstate Commerce Commission found that these railroads owe this plaintiff so much money, and that it has not yet been paid. The Act says that that finding of the Commission shall be prima facie evidence of the facts, and you will therefore say whether or not the plaintiff is entitled to recover the amount of money claimed against each railroad respectively.

The defendants have requested me to instruct you that under all the evidence your verdict must be for the defendants. This is refused.

(Exception noted for defendants by direction of the court to the refusal to charge as requested in the point submitted by them as follows: "Under all the evidence your verdict must be for the defendants.")

And thereafter the jury returned a verdict in favor of the plaintiff and against the defendants as follows:—

"Against the Buffalo, Rochester & Pittsburgh Railway Co. and Philadelphia & Reading Railway Co. $3,684.51; against New York Central & Hudson River Railroad Co. and Philadelphia & Reading Railway Co. $331.08; against Delaware, Lackawanna & Western
62 Railroad Co. and Central Railroad Company of New Jersey $633.79; against Lehigh Valley Railroad Company and Central Railroad Company of New Jersey $1,329.40 and against Lehigh Valley Railroad Co. and Philadelphia & Reading Railway Co. $3,065.76."

And thereupon the defendants moved the Court for judgment non obstante veredicto in their favor in said cause; said motion being in the following words:—

"And Now, this 21st day of October, 1912, a motion for binding instructions in favor of the defendants having been refused by the Court, the defendants by Henry S. Drinker, Jr., Abraham M. Beitler, Edgar H. Boles, James F. Campbell and John G. Johnson, their attorneys, move the Court to have all the evidence taken upon the trial of this cause duly certified and filed, so as to become part of the record and for judgment non obstante veredicto upon the whole record."

And thereafter the learned Court dismissed the said motion and

ordered judgment to be entered for the plaintiffs upon the verdict, on the 30th day of October, 1912; and thereupon on motion of counsel for the defendants, the learned Court granted an exception to the dismissal of the said motion and to the entry of said judgment.

And thereupon counsel for the plaintiffs moved the Court for the allowance of a counsel fee to them in accordance with the statutes of the United States in such case made and provided.

And thereupon, on the said 30th day of October 1912, the learned Court allowed the counsel for the plaintiffs a fee of $1,000 for their services to the plaintiffs in said cause in the proceedings before the United States Commerce Commission and a further fee of $1,000 for their services to the said plaintiffs in the proceedings in this cause;

63 and thereupon the learned Court, upon motion of counsel for the defendants, granted to them an exception to the allowance of anything to the counsel for the plaintiffs for their services in said cause before the United States Commerce Commission.

And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said Court and to the action of the said Court upon the said motion for judgment non obstante veredicto and to the allowance to counsel for plaintiffs of any counsel fee for services in said cause before the United States Commerce Commission; and inasmuch as the said charge and opinion and the action of the Court as aforesaid so excepted to do not appear upon the record:

The counsel for the said defendants did then and there tender this Bill of Exceptions to the opinion and action of the said Court and requested the Trial Judge to certify that said Bill of Exceptions contained all the evidence taken upon the trial of this cause, and requested that the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereupon the aforesaid Judge, at the request of the said counsel for the defendants, doth hereby certify that the foregoing Bill of Exceptions contains all the evidence taken upon the trial of this cause before him, and doth put his seal to this Bill of Exceptions, pursuant to the statute aforesaid in such case made and provided, this first day of November A. D. 1912.

JAMES B. HOLLAND. [SEAL.]

Order of Court.

Filed Oct. 30, 1912.

Before Holland, J.

And now, to wit: this 30th day of October, 1912, it is

64 Ordered that the defendant's motion for judgment non obstante veredicto be refused, and that judgment be entered on the verdict.

Further Ordered that counsel for plaintiffs be allowed a counsel

fee of One Thousand ($1,000) Dollars for their services in the proceedings before the United States Commerce Commission, and a further fee of One Thousand ($1,000) Dollars for their services in the proceedings in this cause;

Further Ordered that an exception be granted to the refusal of the motion for judgment N. O. V. and to the entry of judgment in favor of the plaintiff, and to the allowance of counsel fees to the plaintiffs' counsel for their services in said cause before the United States Commerce Commission.

By the Court.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Præcipe for Judgment.

Filed Oct. 31, 1912.

To the Clerk of the District Court for the Eastern District of Penna.:

Enter judgment in favor of the plaintiff and against the defendants upon the verdict rendered by the jury on Monday, October 21st, 1912, in the following amounts:

Against the Buffalo, Rochester & Pittsburgh Railway Co., and the Philadelphia and Reading Railway Company, Three thousand six hundred and eighty-four dollars and fifty-one cents	$3684.51
Against the New York Central and Hudson River Railroad Company and the Philadelphia & Reading Railway Company, Three hundred and thirty-one dollars and eight cents	331.08
Against the Delaware, Lackawanna & Western Railroad Co. and the Central Railroad Company of New Jersey, Six hundred and thirty-three dollars and seventy-nine cents	633.79
Against the Lehigh Valley Railroad Co. and the Central Railroad Company of New Jersey, the sum of One thousand three hundred and twenty-nine dollars and forty cents	1329.40
Against the Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company the sum of Three thousand sixty-five dollars and seventy-six cents	3065.76

FRANK VAN SANT,
ARTHUR R. THOMPSON,
VIVIAN FRANK GABLE,
Attorneys for Plaintiffs.

Judgment.

Filed Oct. 31, 1912.

Before Holland, J.

And now, to wit: this 31st day of October, 1912, in accordance with præcipe filed, judgment is hereby entered in favor of the plaintiffs and against the defendants in the above entitled case, upon the verdict in the following amounts:

66

Against the Buffalo, Rochester & Pittsburgh Railway Co., and the Philadelphia and Reading Railway Company, Three thousand six hundred and eighty-four dollars and fifty-one cents	$3684.51
Against the New York Central and Hudson River Railroad Company and the Philadelphia & Reading Railway Company, Three hundred and thirty-one dollars and eight cents	331.08
Against the Delaware, Lackawanna & Western Railroad Co. and the Central Railroad Company of New Jersey, Six hundred and thirty-three dollars and seventy-nine cents	633.79
Against the Lehigh Valley Railroad Co. and the Central Railroad Company of New Jersey, the sum of One thousand three hundred and twenty-nine dollars and forty cents	1329.40
Against the Lehigh Valley Railroad Company and the Philadelphit & Reading Railway Company the sum of Three thousand sixty-five dollars and seventy-six cents	3065.76

By the Court.
Attest:

LEO A. LILLY,
Deputy Clerk.

Specifications of Error.

Filed Nov. 9, 1912.

1. The learned trial Judge erred in admitting in evidence the findings and order of the Interstate Commerce Commission in the above entitled cause. (Record p. 46.)

67 2. The learned trial Judge erred in refusing to charge the jury as requested by the defendants in the point submitted by them as follows:

"Under all the evidence your verdict must be for the defendants." (Record, p. 61.)

3. The learned Court erred in dismissing defendants' motion for

judgment non obstante veredicto. Said motion was in the following words:

"And now, this 21st day of October, 1912, a motion for binding instructions in favor of the defendants having been refused by the Court, the defendants by Henry S. Drinker, Jr., Abraham M. Beitler, Edgar H. Boles, James F. Campbell and John G. Johnson, their attorneys, move the Court to have all the evidence taken upon the trial of this cause duly certified and filed, so as to become part of the record, and for judgment non obstante veredicto upon the whole record." (Record, p. 62.)

4. The learned trial Judge erred in allowing counsel for the plaintiffs a fee of $1000. for their services to the plaintiffs in said cause in their proceedings before the Interstate Commerce Commission. (Record p. 62.)

5. The learned trial Judge erred in entering judgment for the plaintiffs upon the verdict. (Record p. 63.)

EDGAR H. BOLES,
HENRY S. DRINKER, JR.,
JAMES F. CAMPBELL,
ABRAHAM M. BEITLER,
JOHN G. JOHNSON,
Per J. W. BAYARD,
For Defendants.

68 *Petition for Writ of Error.*

Filed Nov. 9, 1912.

The Lehigh Valley Railroad Co.; Buffalo, Rochester & Pittsburgh Railway Co.; New York Central & Hudson River Railroad Co.; Philadelphia & Reading Railway Co.; Central Railroad Company of New Jersey; and Delaware, Lackawanna & Western Railroad Co., defendants in the above entitled cause, being aggrieved by the final judgment made and entered by the Court in the above entitled cause on the first day of November, A. D. 1912, wherein it was adjudged that the plaintiffs shall recover therein against the defendants as follows:

"Against the Buffalo, Rochester & Pittsburgh Railway Co. and Philadelphia & Reading Railway Co., $3684.51; against New York Central & Hudson River Railroad Co. and Philadelphia & Reading Railway Co., $331.08; against Delaware, Lackawanna & Western Railroad Co. and Central Railroad Company of New Jersey, $633.79; against Lehigh Valley Railroad Co. and Central Railroad Company of New Jersey, $1329.40, and against Lehigh Valley Railroad Co. and Philadelphia & Reading Railway Co., $3065.76",

with interest from October 21st, 1912, and that counsel for plaintiffs shall, inter alia, receive from the defendants as counsel fee for their services before the Interstate Commerce Commission in said cause, the sum of $1000., come now by their attorneys, Edgar H. Boles, Henry S. Drinker, Jr., Abraham M. Beitler, James F. Camp-

bell and John G. Johnson, and petition the Court for an order allowing the said defendants to prosecute a writ of error from the said judgment to the Circuit Court of Appeals for the United States for the Third Circuit, in accordance with the laws of the United States in that behalf made and provided; and also that an order be
69 made fixing the amount of security which defendants shall furnish upon such writ of error, and that upon giving such security all further proceedings in this Court shall be stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Third Circuit.

And your petitioners will ever pray, &c.

EDGAR H. BOLES,
HENRY S. DRINKER, JR.,
JAMES F. CAMPBELL,
ABRAHAM M. BEITLER,
JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorneys for Petitioners.

November 7th, 1912.

Order of Court.

Filed Nov. 9, 1912.

Before HOLLAND, *J.*:

And now, November 9th, 1912, on motion of Edgar H. Boles, Henry S. Drinker, Jr., Abraham M. Beitler, James F. Campbell and John G. Johnson, attorneys for defendants,

It is Ordered that a writ of error to the United States Circuit Court of Appeals for the Third Circuit, from the final judgment heretofore filed and entered in the above entitled cause, be and the same is hereby allowed, and that a certified transcript of the record and of the proceedings herein be forthwith transmitted to the said Court.

And it is further Ordered that the bond for damages and costs in the said appeal be and the same is hereby fixed at $18,089.08.

By the Court.

Attest:

HENRY B. ROBB,
Deputy Clerk.

70 *Bond sur Writ of Error.*

Filed Nov. 26, 1912.

Know all Men by These Presents, that we, Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; New York Central & Hudson River Railroad Company; Philadelphia & Reading Railway Company; Central Railroad Company of New

Jersey; and Delaware, Lackawanna & Western Railroad Company, as Principals, and United States Fidelity and Guaranty Co. as Surety, are held and firmly bound unto J. Mitchell Clark, William H. Mills and J. Armstrong Rawlings, co-partners trading under the firm name of Naylor & Company, in the full and just sum of Eighteen thousand Eighty-nine dollars and eight cents ($18,089.08) to be paid to the said J. Mitchell Clark, William H. Mills and J. Armstrong Rawlings, co-partners trading as aforesaid, their certain attorney, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of November in the year of our Lord One thousand nine hundred and twelve (1912).

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said Court between the said J. Mitchell Clark, William H. Mills and J. Armstrong Rawlings, co-partners trading as Naylor and Company, and Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company,
71 Central Railroad Company of New Jersey, and Delaware, Lackawanna & Western Railroad Company, to April Sessions, 1911, No. 1416, judgment was rendered against the defendants in said cause as follows:

"Against the Buffalo, Rochester & Pittsburgh Railway Co. and Philadelphia & Reading Railway Co., $3684.51; against New York Central & Hudson River Railroad Co. and Philadelphia & Reading Railway Co., $331.08; against Delaware, Lackawanna & Western Railroad Co. and Central Railroad Company of New Jersey, $633.79; against Lehigh Valley Railroad Company and Central Railroad Company of New Jersey, $1329.40 and against Lehigh Valley Railroad Co. and Philadelphia & Reading Railway Co., $3065.76",

and the said defendants having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said J. Mitchell Clark, William H. Mills and J. Armstrong Rawlings, co-partners trading as Naylor & Company, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Third Circuit to be holden in the City of Philadelphia within thirty days;

Now the condition of the above obligation is such that if the said Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; New York Central & Hudson River Railroad Company; Philadelphia & Reading Railway Company; Central Railroad Company of New Jersey; and Delaware, Lackawanna & Western Railroad Company prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

72 Sealed and delivered in the presence of:

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS, *President.*

Attest:
[SEAL.] E. A. ALBRIGHT,
Assistant Secretary.

BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY,
By N. NURUM, *President.*

Attest:
[SEAL.] ERNEST REHER, *Secretary.*

Form approved Nov. 18, 1912.
HAVEN & HAVEN.
S. M. H.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
By W. C. BROWN, *President.*

Attest:
[SEAL.] D. W. PARDEE, *Secretary.*

O. K.
H. S. L.
N. H. H.

PHILADELPHIA & READING RAILWAY COMPANY,
By GEO. F. BAER, *President.*

Attest:
[SEAL.] J. V. HARE,
Assistant Secretary.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By W. G. BESLER, *Vice President.*

Attest:
[SEAL.] G. O. WAKEMAN, *Secretary.*

Form approved.
JACKSON E. REYNOLDS, *Gen'l Att'y.*

73 DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
By W. H. TRUESDALE, *President.*

Attest:
[SEAL.] A. D. CHAMBERS, *Secretary.*

Form approved.
W. S. JENNEY,
General Counsel.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By J. WALTER ZEBLEY,
Resident Vice President.

Attest:
[SEAL.] THEO. HUNT,
Resident Secretary.

Before HOLLAND, *J.*:
Bond approved.
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.
11-26-12.

Stipulation for Record on Writ of Error.

Filed Nov. 13, 1912.

And now, November 12th, 1912, it is stipulated and agreed that the record sent to the Circuit Court of Appeals upon the Writ of Error allowed in the above entitled cause shall contain:

1. The docket entries;
2. Petitioners' statement of claim;
3. Defendants' plea;
4. Bill of Exceptions;
5. Petition for Writ of Error and order thereon;

74 6. Specifications of Error;
7. Bond covering writ of error, and no other papers.

EDGAR H. BOLES,
HENRY S. DRINKER,
JAMES F. CAMPBELL,
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Per J. W. BAYARD,
Attorneys for Defendants.
ARTHUR R. THOMPSON,
FRANK VAN SANT,
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Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify

that the annexed and foregoing is a true and faithful copy of pleas and proceedings in the case of J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, co-partners, trading under the firm name of Naylor & Company, v. Lehigh Valley Railroad Company et al., No. 1416, April Session, 1911, as per stipulation filed, a copy of which is hereto annexed now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia this second day of December, in the year of our Lord one thousand nine hundred and twelve, and in the 137th year of the Independence of the United States.

[SEAL.] WILLIAM W. CRAIG,
Clerk District Court U. S.

75 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1708.

LEHIGH VALLEY RAILROAD COMPANY et al., Plaintiff- in Error,
vs.
J. MITCHELL CLARK et al., Defendants in Error.

And afterwards, to wit, on the seventh day of March, 1913, come the parties aforesaid, by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington and Hon. John B. McPherson, Circuit Judges, *and* the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-fifth day of August, 1913, come the parties aforesaid, by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

76 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1708.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Corporations, Plaintiffs in Error,

vs.

J. MITCHELL CLARK, WILLIAM H. MILLS, and J. ARMSTRONG RAWlins, Co-partners, Trading under the Firm Name of Naylor & Company, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington and McPherson, Circuit Judges.

GRAY, *Circuit Judge:*

In the court below suit was brought by the defendants in error (hereinafter called plaintiffs) against the plaintiffs in error
77 (hereinafter called the defendant companies) under authority of the Act of Congress of February 4, 1887, amended by the Acts of March 2, 1889, and of June 29, 1906 (See 24 Stats., Chap. 104; 25 Stats., Chap. 382, and 34 Stats., Chap. 3591), to recover damages from the defendant companies, alleged to have been awarded by way of reparation to the plaintiffs, in certain proceedings had before the Interstate Commerce Commission.

As authorized by section 13 of said act, the plaintiffs, on April 4, 1908, applied by petition to the said commission, complaining that defendant companies, during certain named years, had exacted and collected from the plaintiffs the rate of $2.00 per gross ton for the transportation of pyrites cinder, by rail from Buffalo, New York, to points of destination in Pennsylvania and New Jersey. The plaintiffs, as petitioners as aforesaid, attacked the rate of $2.00 per gross ton on pyrites cinder, as excessive, unjust, unreasonable and unduly discriminatory, and therefore in violation of the said act and the acts amendatory thereof, and prayed that the defendant companies be ordered to desist from exacting and collecting such unreasonable rate; that a lower rate be put in effect, and that reparation be granted to the petitioners. The defendant companies, having been served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by the parties. Thereafter, January 5, 1909, as alleged in the petition of plaintiffs in the court below, the Interstate Commerce Commission made a finding and report, which was duly filed, ordering the said $2.00 rate on pyrites cinder to be reduced to a rate not exceeding $1.45 per gross ton for the carriage thereinbefore named, but refused to award reparation

to the plaintiffs; a certified copy of which finding, with the order of the commission, is attached and made part of the petition and
78 statement of claim of the plaintiffs. It is then alleged by plaintiffs that the defendant companies duly complied with this order of the Interstate Commerce Commission, and on or before February 25, 1909, established and put in effect, and now have in effect, the aforesaid reduced transportation rate. It is further alleged that on May 9, 1909, the plaintiffs duly filed with the Interstate Commerce Commission a motion for a rehearing on the question of reparation alone, which motion was granted, and notice of the granting of the same given to all parties, who appeared at the taking of additional testimony by the plaintiffs. That after hearing and argument, the Interstate Commerce Commission, on June 2, 1910, made a finding and ordered the defendant companies to make reparation to the petitioners, specifying the amount to be refunded in each case, a certified copy of the report, conclusions and order of the commission on the rehearing being attached as an exhibit to the petition and statement of plaintiffs in the court below. The plaintiffs aver that a true copy of the aforesaid order of the commission, dated June 2, 1910, was duly served upon the defendant companies, and demand made that they should pay to the petitioners the sum claimed in their petition and as set forth in the aforesaid order of the commission, but that said defendant companies have wholly failed, neglected and refused to pay the same, &c.

Upon the facts thus alleged the plaintiffs aver in their petition and statement of claim in the court below, that they are lawfully and legally entitled to receive and recover from the said defendant companies the several amounts of money set forth, as and for damages and reparation, in accordance with the said order of the Interstate Commerce Commission, dated June 2, 1910.

Section 14 of the original Interstate Commerce Act pro-
79 vided that in an investigation made by the commission, it shall be its duty to make a report in writing, which shall include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." Section 16 provides for the refusal or neglect "to obey any lawful order or requirement of the commission," by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a circuit court of the United States *sitting in equity*, and empowering such court, as a court of equity, to hear and determine the matter, on notice to the common carrier complained of, "in such manner as to do justice in the premises," with full power to conduct all such inquiries as the court may think needful to enable it to form a just judgment in the matter, "and on such hearing the report of said commission shall be *prima facie* evidence of the matters therein stated." And it is provided that, if it be made to appear to the court "that the *lawful order* or requirement of said commission, drawn in question, has been violated

or disobeyed," the court may issue a "writ of injunction or other process, mandatory or otherwise," to restrain the common carrier from further violation or disobedience of the order or requirement of the commission, and enjoining obedience to the same, with power to issue writs of attachment or other process incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier. (The italics here, as elsewhere, are ours.)

It seems clear from these sections of the Act of '87, as they originally stood, that Congress had not contemplated a distinction
80 between reparation cases and other cases in which the order of the commission was not complied with. Circuit courts were vested with jurisdiction to entertain the complaint of a person interested, that an order had not been complied with, and to hear and determine the matter as courts of equity, giving the redress peculiarly appropriate to equitable jurisdiction, and for that purpose, all the findings of fact by the commission, as well as all the evidence taken before the commission, as set forth in the record, were before the court. As all the proceedings for the enforcement of the legal orders of the commission were solely in equity, a difficulty was soon recognized in reparation cases. It is one thing to enforce by injunction or mandatory process the lawful ministerial order of the commission, as to things to be done or not to be done *in futuro* by defendant carriers in the conduct of their business, and quite another thing to enforce an order for the payment of damages by such carriers for a past violation of law. The claim for such damages, as said by the commission in Heck and Petree vs. R. R. Co., 1 Int. Com. Comm. Rep. 495, "presents a case at common law in which the defendants are entitled to a jury trial," under the seventh amendment to the Constitution. As the statute provided for no trial by jury in the suits to enforce such awards, the commission repeatedly held that it could make no award of damages in such case, for the reason that the defendants were entitled to have the amount assessed by a jury.

This state of things undoubtedly brought about the amendment to section 16 of the original act, by the Act of March 2, 1889. By this amendment Congress recognized the propriety of the suggestion made by the commission, and added to section 16 of the original act the following:

"If the matters involved in any such order or requirement
81 of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same after notice, &c., * * * it shall be lawful for any company or person interested in such order or requirement to apply in a summary way, by petition, to the circuit Court of the United States sitting as a court of law * * * alleging such violation or disobedience as the case may be; and said court shall, by its order, then fix a time and place for the trial of said cause. * * * And it shall be the duty of the marshal of the district * * * to forthwith serve a copy of said petition and of said order upon each of the defendants, and it

shall be the duty of the defendants to file their answers to said petition within ten days, &c. * * * At the trial (of) the findings of fact of said commission, as set forth in its report, shall be *prima facie* evidence of the matters therein stated."

This amendment, made to preserve the constitutionality of reparation proceedings, left the jurisdiction, in cases not involving reparation, to the circuit Courts sitting as courts of equity, as originally provided. These cases arise either on a petition by the commission or party interested, to enforce its order, or on an application for injunction by the party defendant, to restrain its enforcement. In either case, the entire record is before the court, and it can examine all the evidence before the commission, or evidence in addition thereto, to determine the question of the *legality* of the order. The making of such an order is a ministerial function, though *quasi* judicial in the sense that it must be made in the course of an orderly procedure, in which the parties interested may be fairly heard and evidence fairly considered. These fundamental conditions appearing, the order is *"lawful,"* and must be obeyed and enforced.

82 It is as though Congress had enjoined as a duty the things embraced in such lawful order. It is in this view of a non-reparation case that the finding of the commission of the reasonableness or unreasonableness of a rate is a finding of an ultimate fact, which will not be disturbed by a court of equity unless the legality of the proceeding in which it is made is successfully attacked.

In such cases the judicial power of a court of equity is invoked to enforce the *lawful* order of the commission, and involves no controversy requiring a trial by jury. It is the *lawful* order, *qua* order, of the commission, as an administrative body, that is to be enforced; whereas, in reparation cases, there is a controversy at common law as to whether the damages awarded by the commission or any damages are recoverable, and the mere order of the commission, as we shall see, only figures in the case as a necessary condition precedent to the bringing of the action, though the findings of facts by the commission, as set forth in its report, are *prima facie* evidence of the matters therein stated. The damages sought are only recoverable by the verdict of a jury and judgment thereon, as in ordinary trials at common law.

Section 14 of the original Act of 1887 is left unchanged by this amendatory Act of '89. By the Act of 1906 (commonly called the "Hepburn Act") important amendments were made to the Act of '87, as amended by the Act of '89. The most important of these amendments was the enlargement of the powers of the commission, by authorizing them, not only to find the rates of interstate carriers unreasonable or excessive, but to determine and fix and make mandatory what, in the opinion of the commission, under all the circumstances, would be a reasonable rate. With this we are not here concerned. Section 14 was amended so as to read as follows:

83 "That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises;

and in case damages are awarded, such report shall include the findings of fact on which the award is made."

The effect of this amendment is that in *non-reparation* cases, for reasons peculiar to such cases, as above pointed out, the commission henceforth need make no findings of fact on which it bases its conclusions. In reparation cases, however, it is still bound to make findings of all the facts, which it was its duty to make before the amendatory Act of 1906; not merely the facts relating to petitioner's particular tonnage and dates of shipment, but also all the facts on which the commission based its conclusion as to the propriety of an award of damages.

Section 16 was also amended so as to make still more clear the distinction between reparation and non-reparation cases. It provides that where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, under the provisions of the act, for a violation thereof, it "shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file in the circuit court of the United States for the district in which he resides * * * a petition, setting forth briefly the *causes* for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit, the finding and order of the commission shall be *prima facie* evidence of the facts *therein stated.*" After other provisions, with which we are not here concerned, the section further emphasizes the distinction between reparation and non-reparation cases, as follows:

84

"If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money,* while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, * * * for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise," &c.

As we have before remarked, section 14, as amended by the Act of 1906, relieved the commission of the duty of stating specifically the findings of fact on which it based its conclusions in cases where damages were not awarded, and it is simply required to make a report, which shall state the conclusions of the commission, together

with its decision, order or requirement in the premises. The district court, as a court of equity, will consider the order it is asked to enforce as valid, when it appears to have been made in the course of a regular hearing and to be founded upon evidence and facts
85 proved by testimony. Much light is thrown upon a situation of this kind by the recent decision of the Supreme Court in the non-reparation case of Interstate Commerce Commission vs. The Louisville & Nashville R. R. Co. Mr. Justice Lamar, delivering the opinion of the court, said:

"In a case like the present the court will not review the commission's conclusions of fact (Int. Com. Comm. vs. Del., &c., Ry., 220 U. S. 251) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' (36 Stats. 551.)"

So. Pac. Co. vs. Int. Com. Comm., 219 U. S. 433.

So much for the conclusiveness of a decision or order of the commission in a non-reparation case, where a court of equity is asked to enjoin the enforcement of such decision or order as the valid order of an administrative body. Such an order, if it stands the tests of legality laid down by the Supreme Court in the case above referred to, is conclusive upon a court of equity where such administrative order is sought to be enforced. But it is clear that, in a reparation case, though the award of damages by the commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and is not of itself evidence of *liability, prima facie* or otherwise, in any judicial proceeding.

The amended Act of 1906, no less than the original act, or
86 the same as amended in 1889, expressly requires that the report of the commission "shall include the findings of fact on which the award is made." The Act of 1889 and the Act of 1906 both provide that, where damages are awarded by way of reparation, they can be recovered or enforced only by a suit at common law in a circuit court of the United States, requiring a trial by jury. The Act of 1906 makes clear the plenary character of such a suit, by providing that it "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit, the findings and order of the commission shall be *prima facie* evidence of the facts therein stated." It hardly needs that attention be called to what is so obvious, that both the "findings and order" are *prima facie* evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is *prima facie* evidence of damages, or the proper measure thereof.

As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation

thereof *in futuro,* in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury actually suffered possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it depend upon the precedent award of reparation by the commission, such award is not of the nature of the administrative functions conferred on that body.

In the case of Western N. Y. & P. R. Co. vs. Penn Refining
87 Co., 70 C. C. A. 23, which was decided with reference to the original act, as amended by the Act of 1889, we said:

"In proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act, and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

The judgment in this case was affirmed by the Supreme Court, with no criticism of the language quoted. (208 U. S. 208.)

With this understanding of the true intent and meaning of the Interstate Commerce Act of 1887, as amended in the respects hereinbefore discussed, we may state as conclusions fairly resulting therefrom, the following:

(1) That a suit brought by one in whose favor the commission has made an award of damages, by way of reparation, under the authority of section 16 of the act, is not a suit on the award, *qua* award, to recover the amount of the same, but a plenary suit for damages actually incurred by the plaintiff, by reason of some violation of the act by the defendant.

(2) In the prosecution of such a suit, plaintiff must prove facts from which defendant's liability may be properly inferred, and not merely conclusions of the commission from facts.

(3) Such suit is expressly required by the act to be proceeded in "like other civil suits for damages," which can mean nothing less than that the "parties are entitled to an impartial trial by
88 jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right."

(4) "The procedure contemplated by the act, and, unless waived required by the constitution, is jury trial accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

(5) This essential right is not invalidated or impaired by the qualification of the rules of evidence, to the effect that the "findings and order of the commission shall be *prima facie* evidence of the facts therein stated."

(6) By reason of this qualification, the plaintiff may now avail

himself of a new method to get these facts before the jury. He need not examine witnesses or offer writings, as he was obliged to do before the commission; presumably this has already been done, and he is relieved from the burden of doing it again; but he can only be so relieved by following the method specifically pointed out by Congress.

(7) That method is this: There must be found somewhere and in some form, sufficiently clear and sufficiently definite findings of the commission in which the needful facts are stated, and in which the defendant is thus given due notice where and how he is charged with wrong doing.

(8) It does not necessarily follow, from a finding by the commission that a given tariff rate established by the defendant is unreasonable and that a lower rate fixed by the commission is reasonable, that plaintiff has suffered pecuniary damage, by reason of the exaction by defendant of the former rate, or, if any such damage has been suffered, that the difference between the rate abro-
89 gated and the lower rate established is the measure of such damage. If any damage is shown, it may be either greater or less than such difference.

(9) The authorization of a suit for damages by one claiming to be injured by a specific violation of the act by a carrier, is not imposed as a penalty in addition to the fines imposed and made payable to the Government for every specific violation of a requirement of the act, but a remedy for an injury actually incurred by a private person because of the wrongful act of the carrier.

We turn to the consideration of the case, as presented in the record before us. The plaintiffs, in their petition to the court below, set forth the fact of their application to the Interstate Commerce Commission, charging against the defendant companies the exaction of an excessive and unreasonable rate per ton for the transportation of pyrites cinder between points in the State of New York and the States of Pennsylvania and New Jersey. They then set forth the statements made by the commission in two several reports, in the first of which, dated January 5, 1909, the commission finds the rate as complained of unreasonable, and directs that it thereafter be reduced to a rate named, but declines to award damages by way of reparation. They also allege that the defendant companies duly complied with the aforesaid order of the commission within the time limited therefor. The petition then states that on May 8, 1909, the petitioners filed a motion with the commission for a rehearing, on the *question* of *reparation alone*, notice of the granting of which was duly given to all parties who appeared at *the taking of additional testimony by the petitioners*, and that after hearing and argument, the commission made a report, awarding damages as prayed for.

The petition then concludes with a statement of the demand
90 made from the defendant companies for the payment of the sum awarded, and of their refusal to pay the same.

At the trial, the plaintiffs offered in evidence these reports and orders of the Interstate Commerce Commission, as *prima facie* evidence of the facts found therein. After objection by counsel for the

defendant companies, the said reports and orders of the commission were admitted for what they were worth as findings of fact. Except that one witness was produced to prove that the award of the commission had not been paid by the defendants, these two reports and orders constituted the only evidence produced by the plaintiffs, and after their admission by the court, plaintiffs rested their case. No evidence was offered by the defendants.

The first report, and the order made thereon January 5, 1909, is as follows:

"This complaint involves the reasonableness of the rate of $2 per gross ton on pyrites cinder over the lines of the defendant companies from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey.

"Iron pyrites is a high grade ore containing a large percentage of both sulphur and metallic iron. It is imported, chiefly from Spain, by fertilizer and chemical works located in this country. At these works this ore is burned in specially constructed furnaces, and from the arising sulphuric fumes sulphuric acid is obtained. The resultant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore. This pyrites cinder, the rate upon which complainants claim to be excessive, is shipped to blasting furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron. It is alleged by the complainants that
91 pyrites cinder being a low grade commodity, valued at about $1 per gross ton at Buffalo, is unable to move at the $2 per ton rate; the output at the chemical works at Buffalo being from 20,000 to 25,000 tons per year, only one-quarter of which is sold. Pyrites cinder is also produced at chemical works in Bayonne, N. J., where it is valued at $2 per ton, the difference between the value at Buffalo and the value at Bayonne being, it is claimed, accounted for because of the difference in freight rate to points of destination in New Jersey and Pennsylvania. This fact is emphasized by complainants that the iron pyrites bears a rate from New York, Philadelphia and Baltimore to Buffalo of but $1.40 per ton, while the pyrites cinder for a return haul of but a part of the distance bears a rate of $2 per ton, the cheaper commodity for a shorter haul being charged a greater amount than the higher grade commodity for a longer haul.

"The contention of the defendants by way of answers is that pyrites cinder should take a higher rate than iron ore between the same points, owing to the longer time consumed in loading the former than the latter, and because iron ore is consumed in greater quantities than pyrites cinder. It appears that it does in fact take much less time to load iron ore than pyrites cinder, and a car load of iron ore is slightly heavier than a load of pyrites cinder. The rate on iron ore is $1.45 per ton to points of destination carrying a $2 rate on pyrites cinder.

"We are of the opinion that the rate on pyrites cinder should not

exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded."

The second report and order of June 2, 1910, made upon a rehearing and investigation upon the question of reparation alone, as applied for by the plaintiffs, is as follows:

"In the report made by this commission following an in-
92 quiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey, the rate was found excessive and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied.

Naylor & Co. vs. L. V. R. R. Co., 15 I. C. C. Rep. 9.

"Pursuant to the commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for a rehearing upon the question of reparation, and after consideration by the commission the motion was granted. *Additional evidence* was taken and the parties were heard in oral argument.

"We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the Statute of Limitations."

Then follow the specific awards against the different defendant companies.

Plaintiffs contend that this hearing and investigation applied for by plaintiffs on the question of reparation alone, though had more than a year after the former report denying reparation, was a rehearing of the original application to the commission, and that therefore the first report and such findings as were contained therein were part of the second report. While this may in some respects be true, it is also true that reparation had been denied at the first hearing,
and that the second hearing on the question of reparation
93 alone was a distinct proceeding on that issue. That it was so, appears by the statement of the commission itself, that "additional evidence was taken and the parties were heard in oral argument." It does not follow that, because a given rate is found to be excessive and unreasonable, and is ordered to be discontinued and another rate established, the complainant has suffered or is entitled to damages by way of reparation. Notwithstanding such a finding and order, there are many circumstances and considerations, such as the relations between the parties, want of knowledge by the defendant companies of the facts bearing on the question of reasonableness, lack of intention to violate the law in that respect, or lack of proof of actual damage suffered by plaintiffs, which might influence the commission or a jury in coming to the conclusion that the applicant was not entitled to an award of reparation or damages. And

this was the conclusion of the commission at the first hearing. The fact that, while pyrites cinder was paying $2 per gross ton, from Buffalo, New York, to points in Pennsylvania and New Jersey, iron ore was being charged $1.45 per ton, from the ports of Philadelphia and Baltimore to Buffalo, and that such difference was unreasonable, was not sufficient at the first hearing to convince the commission that the applicant had suffered or was entitled to pecuniary damages. As said by the Supreme Court in Parsons vs. Chicago & N. W. Ry., 167 U. S. 447, "the only right of recovery given by the Interstate Commerce Act to the individual, is to the persons or person injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act; and before any party can recover under the act he must show, not merely the wrong of the carrier, but, that that wrong has operated to his injury."

94 And so we find that, in the second report in which reparation was awarded, the commission states that additional evidence was taken and the parties were heard in oral argument. What this additional evidence was, or what were the facts which the commission found, as established by it, is nowhere stated in the report. So that we have nothing in the way of the findings of facts required by the statute upon which the award of reparation by the commissioners was made. The second report does not state that reparation was awarded upon any supposed findings of fact in the first report. Nor could it well have been, because the commission, though finding the charge made by the defendant companies to be unreasonable, distinctly declined to find that plaintiffs were entitled to reparation. It is reasonable to conclude, therefore, that the award of reparation was made upon the facts established by the additional evidence. Section 14 of the Interstate Commerce Act, as amended, is peremptory in its requirement that in such case the commission should include in their report the findings of fact on which their award was made.

But, even if the reference to the first report were sufficient to incorporate all its statements and supposed findings of fact in the second report, yet the facts of which those statements or findings are the *prima facie* evidence, are wholly insufficient to support the plaintiffs' claim for damages.

As the commission in its first report had refused reparation, it was relieved by the amendment of 1906 from the duty of including in its report the findings of fact on which its conclusion as to the unreasonableness of the rate was based. Such findings are not to be expected in that report. The statements in the opinion that most nearly approach in character findings of fact, are that iron pyrites is a high grade ore containing a large percentage of both sulphur and

95 metallic iron; that it is imported chiefly from Spain by fertilizer and chemical works; the ore is burned at these works, and from the arising sulphuric fumes, sulphuric acid is obtained; that the resultant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from one to three per cent., the amount of residue determining the value of the

cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore; that this pyrites cinder is shipped to blast furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron.

Though these facts be taken by the jury as *prima facie* true, they clearly have no relevancy to the demand of the plaintiffs for damages. What follows is a summary by the commission of the contentions of the plaintiffs and the defendant companies, without any finding by the commission as to the facts embodied therein, except that, in stating the contention of the defendant companies, it does affirm some of the facts upon which it is founded.

But for the reasons already stated, even if these statements of the contentions of the parties are to be regarded as findings of fact, we are still of opinion that, however they may have justified the finding of the commission as to the unreasonableness of the charge on pyrites cinder, and the order for its reduction to the rate charged on iron ore, they do not justify the jury in awarding damages to the plaintiffs. It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the acts make certain findings of fact *prima facie* evidence of such facts, it also determines their probative force.

Counsel for plaintiffs apparently does not much rely, if at all, upon these statements in the first report of the commission, to which we have referred, as findings of fact sufficient for his purpose.
96 The case was apparently tried in the court below and has been argued here by counsel for the plaintiffs, on the theory that the commission having found as a fact that the rate exacted by the carriers was unreasonable; that that fact, together with the award of reparation, as set forth in the reports and orders of the Interstate Commerce Commission, must stand as *prima facie* proof of plaintiffs' case before the jury. As a matter of fact, that was plaintiffs' claim in their petition. What we have already said, should be sufficient to expose the fallacy of that theory. It is only as to the *facts* contained in the order, that the order is made *prima facie* evidence. But the orders themselves of the commission are not *prima facie* evidence as to the question of liability in a judicial proceeding. As well said by Judge McCall in Darnell-Taenzer Lumber Company vs. So. Pac. Co., 190 Fed. Rep. 659:

"This must be so for two reasons: First, if the Congress intended that the order making the award should be taken as *prima facie* evidence of the liability of the carrier, then it would seem that it did a useless thing, in requiring the commission by the terms of the act to make findings of fact in cases where awards for damages are allowed. *. * * In such a case, the court would be at a loss to know whether it would be controlled by the facts reported or the order made by the commission, in pronouncing its judgment."

But, upon this theory, the case was actually submitted to the jury, and presumably upon that theory determined by them. We find that the court below submitted the case to the jury, as follows:

"These amounts were awarded by the commission against these railroads in favor of the plaintiff.

"The plaintiff has submitted to you evidence to establish
97 the fact that these railroads have not, up to this time, paid these awards. They also submit to you the reports of the Interstate Commerce Commission, for the purpose of showing that that finding was made by the commission, and that these awards in favor of the plaintiff were made against these railroad companies. This same Act of 1887, the Interstate Commerce Act, section 16, says that such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and the order of the commission shall be *prima facie* evidence of the facts therein stated. You will notice that the Act of Congress says that the findings of the commission shall be *prima facie* evidence of the facts therein stated. In the report, the facts stated are, as I have read them to you, that is, the commission finds that $2 a ton is an excessive charge on this ore, and it is excessive to the extent of the difference between $1.45 per ton and $2.00 per ton; and then it proceeds to state the number of tons that each of the railroads carried for the plaintiff at that excessive amount, and awards an amount to the plaintiff equal to the amount of the excessive charge on the number of tons carried. That is to say, it has found that these railroads owe this plaintiff the amount of money stated, and found in the report, because of the fact that the railroads charged them excessive freight. The act says that that shall be *prima facie* evidence. That means that it shall be established, *prima facie*, the facts therein contained unless contradicted or explained. The defendants have offered no evidence whatever, and leave the record as to the evidence the same as it was when the plaintiff closed its case. You have nothing, then, before you except that the Interstate Commerce Commission found that these railroads owe this plaintiff so much money, and that it has not yet been paid. The act says that that finding of the commission shall be *prima facie* evidence of the facts, and you will therefore say whether or not the plaintiff is entitled to recover the amount of money claimed against each railroad respectively."

98 We have quoted all that was said in submitting the case to the jury, that we may do no injustice to the learned and usually careful judge who delivered the charge. It is impossible to say that the jury were not led to believe that they were justified in considering that the order of the commission, that these defendant companies should pay the plaintiffs so much money, was *prima facie* evidence of the defendants' liability therefor.

Since the argument and determination of this case, the opinion of the Supreme Court in Pennsylvania Railroad Co. vs. International Coal Mining Co. has been delivered, and by it the pivotal question involved in this case has been authoritatively and finally disposed of.

In that case, the Coal Mining Company had sued the Pennsylvania Railroad Company, as a carrier in interstate commerce, for $37,268—being the difference between the published tariff rates paid by the plaintiff and lower rates resulting from rebates from the published rates allowed other coal dealers making like shipments over the same road, from the same point to the same destination.

It was objected by the defendant that, inasmuch as the suit was

instituted by plaintiff in the court below, without first having made complaint to the Interstate Commerce Commission, and without any finding by that body that the facts stated constituted a rebate or discrimination prohibited by the act, the court had no jurisdiction to entertain such suit. In disposing of this objection and sustaining the jurisdiction of the court, Mr. Justice Lamar, in delivering the opinion of the court, said:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the commission for reparation.

"In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the Tariff Rate collected was unlawful. It could not have been legalized by any proof, nor could the commission by any order have made it valid. Rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class. This departure from the published tariff was forbidden, and section 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, together with reasonable attorneys' fees.'

"2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that in its pleading the plaintiff does not claim to have been damaged and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time over the same route."

The question here raised is precisely that raised in the present case. Here, as there, in its pleading the plaintiff does not claim specific damages, but contends that, as a matter of law, it was entitled to recover, as damages, the difference between the tariff rate charged and the reasonable rate established by the commission. No distinction in principle can be predicated upon the fact that, in the case under consideration by the Supreme Court, the action was based directly upon an alleged violation of section 2 of the act, prohibiting the giving by a carrier of rebates, etc., as therein defined, and as to which no complaint to the commission was required before bringing a suit. Nor can any distinction be based

upon the bringing of that suit under section 8, instead of under section 16.

In the present case, the action is brought under the provisions of section 16, authorizing a suit for damages, after complaint to and an order made by the Interstate Commerce Commission, but it is a private suit for damages, and not for a penalty, and, as expressly enjoined by the act, is to be proceeded in "in all respects like other civil suits for damages." Otherwise, it would not comply with the mandate of the seventh amendment to the Constitution. There can be no question, therefore, but that what is said by the Supreme Court in regard to the nature of the damages recoverable in a suit before it, is applicable to the damages sought to be recovered in this suit.

We again quote somewhat at length the language of Mr. Justice Lamar in this respect. Referring to the case of Parsons vs. Ry., 167 U. S. 460, and quoting therefrom, with approval, the following language:

"Before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in effect operated to his injury,"

he then says:

"Congress had not then and has not since given any indication of an intent that persons not injured might nevertheless recover
101 what, though called damages, would really be a penalty, in addition to the penalty payable to the Government.

* * * * * * *

"The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:

"If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained;

"But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event, not the shipper but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that the seller and buyer, shipper and consignee, could both

recover would mean that damages had been awarded to two where only one had suffered;

* * * * * * *

"For it (the plaintiff) argues that, whenever it showed that a lower rate had been charged on contract coal sold in 1899 it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been
102 no competition in the two sales and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It claimed that it was a mere matter of mathematics and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

"6. To adopt such a rule and arbitrarily measure damages by rebates, would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted, a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary los varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid.

"7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons case, and is the view taken in the only other case we find in
103 which this question, under the Act to Regulate Commerce, has been construed. In *Knudsen vs. Michigan Central R. R.*, 148 Fed. 974, it was said by the Circuit Court of Appeals for the Eighth Circuit that to 'support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the commission.'"

In conclusion, we are of opinion, first, that there were no sufficient findings of fact in these reports of the commission, as required by the statute; second, that if any of the statements in the first report could

properly be considered as findings of fact, within the meaning of the statute, so as to make such findings *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim or make out even a *prima facie* case for damages. The plaintiffs were not bound to rely upon *prima facie* evidence. The whole field of inquiry was open to them—the production of such testimony as could be found bearing upon the issue, and notably the additional evidence referred to by the commission in its second report. Failing to produce evidence *prima facie* sufficient to show actual damage suffered, and the amount thereof, the defendants were not put to a reply, and the plaintiffs must suffer the consequences of their default.

We think for the reasons stated, the assignment of error, based on the exception to the refusal of the court to give binding instructions in favor of the defendant companies, must be sustained, and the judgment of the court below reversed. And it is so ordered.

(Received and filed August 25, 1913. Saunders Lewis, Jr., Clerk.)

104 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1708 (List No. 20).

LEHIGH VALLEY RAILROAD CO. et al., Plaintiffs in Error.
vs.
J. MITCHELL CLARK et al., Defendants in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, August 26, 1913.

(Signed) GEO. GRAY,
Circuit Judge.

Endorsed: No. 1708. Order Reversing Judgment. Received & Filed August 26, 1913. Saunders Lewis, Jr., Clerk.

105 United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1708.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER & Pittsburgh Railway Company, New York Central and Hudson River Railroad Company, Philadelphia and Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company, Plaintiffs in Error,

vs.

J. MITCHELL CLARK, WILLIAM H. MILLS, and J. ARMSTRONG RAWLINS, Co-partners, Trading under the Firm Name of Naylor and Company, Defendants in Error.

Petition for Writ of Error.

Your Petitioners, J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, Co-partners, trading under the firm name of Naylor and Company, defendants-in-error in the above entitled cause now pending in the United States Circuit Court of Appeals for the Third Circuit represent that a judgment has therein been rendered on the 25th day of August A. D., 1913 reversing a judgment of the District Court of the United States for the Eastern District of Pennsylvania; that the matter in controversy in said suit exceeds One thousand dollars ($1,000) besides costs and that the jurisdiction of none of the above courts mentioned is, or was, dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states; that this cause does not arise under the patent or copyright laws, nor the revenue laws or the criminal laws, neither is it an admiralty case, but

106 it is a case arising under the provisions of the Interstate Commerce Act of 1887 and supplements thereto and amendments thereof, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error which said writ should issue as of right; therefore, your petitioners would respectfully pray that a writ of error be allowed your petitioners in the above entitled case directing the Clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by said defendants in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

A. R. THOMPSON,
VIVIAN FRANK GABLE,
FRANK VAN SANT,
WM. BARCLAY LEX,
Attorneys for Petitioner.

107 *Order.*

And now this fifth day of August A. D. 1914, the foregoing petition is granted, and writ of error allowed as prayed for upon plaintiffs giving bond according to law, in the sum of Five hundred dollars.

(Signed) MAHLON PITNEY,
Associate Justice Supreme Court of the United States.

108 United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1708.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER AND Pittsburgh Railway Company, New York Central and Hudson River Railroad Company, Philadelphia and Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company, Plaintiffs in Error,

vs.

J. MITCHELL CLARK, WILLIAM H. MILLS, and J. ARMSTRONG RAWLINS, Co-partners, Trading under the Firm Name of Naylor and Company, Defendants in Error.

Assignments of Error.

And now this fourth day of August, A. D., 1914 come the defendants in error, J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, Co-partners, trading under the firm name of Naylor and Company by, Arthur R. Thompson, Frank Van Sant, Vivian Frank Gable and Wm. Barclay Lex, their attorneys, and say that in the record and proceedings aforesaid of the said United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said defendants in error in this, to wit:

1.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania.

2.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District
109 Court of the Eastern District of Pennsylvania and failing to award a venire facias de novo.

3.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the findings or inquiry of the Interstate Com-

merce Commission, embodied in its reports and orders, per se and alone, were not sufficient to justify a verdict in favor of plaintiff in the United States District Court for the Eastern District of Pennsylvania in a case under Section 16 of the Act to Regulate Commerce approved February 4, 1887, as amended there being no evidence offered for defendants.

4.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that there were not sufficient finding- of fact made by the Interstate Commerce Commission in the two reports and orders filed of record and given in evidence in the above entitled case, said court did not remand the said reports and orders to the Interstate Commerce Commission for further proceedings and further findings of fact.

5.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the defendants in error your petitioners, failed to produce prima facie evidence showing damage sustained by them from the plaintiffs in error.

6.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the ruling of the United States District Court for the Eastern District of Pennsylvania on the request of plaintiffs in error (defendants in trial court) for binding instruction, which was as follows:

"Under all the evidence your verdict must be for the defendants." which instruction was properly refused by the trial court.

7.

The United States Circuit Court of Appeals for the
110 Third Circuit erred in holding the plaintiffs in error (defendants in District Court) were not put to a reply to the prima facie case made by defendants in error (plaintiffs in the trial court).

8.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that other evidence should have been produced by plaintiffs in error to show damage in some other amount than as found and awarded as reparation by the Interstate Commerce Commission based upon the collection of the unreasonable rate.

9.

The United States Circuit Court of Appeals for the Third Circuit erred in its construction of the Act to Regulate Commerce, approved February 4, 1887, as amended, and applied Section eight thereof to

the case at bar instead of Section sixteen thereof, under which the suit was brought.

10.

The United States Circuit Court of Appeals for the Third Circuit erred in its conclusions:

(*a*) That a suit brought by one in whose favor the Commission has made an award of damages by way of reparation, under Section 16 of the Act is not a suit on the award qua award.

(*b*) That the petition, reports and orders of the Interstate Commerce Commission were not sufficiently clear and sufficiently definite.

11.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the first report and order of the Interstate Commerce Commission, introduced in evidence and passed upon by the jury, was not to be considered as part of the case.

111

12.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the facts submitted to the jury, being the prima facie case made by the two reports and orders of the Interstate Commerce Commission on which the verdict was rendered, were not facts and in substituting its verdict thereon in lieu of that of the jury.

13.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment and the allowance by the District Court of counsel fees taxed as part of the costs as provided by the Statute.

14.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the District Court and in not allowing plaintiff in error reasonable counsel fees to be taxed as part of the costs for services of counsel in the said Circuit Court of Appeals.

15.

Wherefor- the said J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, co-partners, trading under the firm name of Naylor and Company, defendants in error, pray that for the errors aforesaid, and other errors appearing in the record of the said United States Circuit Court of Appeals for the Third Circuit in the above entitled cause to the prejudice of the defendants in error, the said judgment of the United States Circuit Court of Appeals for the Third Circuit be reversed and for naught held, and that the judgment of the United States District Court for the Eastern District of Pennsylvania be affirmed, or for such further proceedings in said cause as

may be determined upon by this honorable court to the end that justice may be done in the premises.

(Sig.) A. R. THOMPSON,
By FRANK VAN SANT,
VIVIAN FRANK GABLE,
FRANK VAN SANT,
WM. BARCLAY LEX,
Attorneys for Defendants in Error.

112 Endorsed: No. 1708. Petition for Writ of Error and Assignments of Error. Received & Filed July 21, 1914. Saunders Lewis, Jr., Clerk.

113 American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Company's Office Building 100 Broadway, New York.

Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1708.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, and Delaware, Lackawanna & Western Railroad Company,

vs.

J. MITCHELL CLARK, WILLIAM H. MILLS, and J. ARMSTRONG RAWLINGS, Co-partners Trading as Naylor & Company.

Know all men by these presents that we, J. Mitchell Clark, William H. Mills, and J. Armstrong Rawlings, co-partners, trading as Naylor & Company, having an office and principal place of business at No. 45 Wall Street, in the City of New York, principals, and American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, in the City aforesaid, as surety, are held and firmly bound unto Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, New York Central & Hudson River Railroad Company, Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, and Delaware, Lackawanna & Western Railroad Company, in the sum of Five hundred dollars ($500), to be paid to the said companies aforesaid, their successors and assigns, to which payment well and truly to be made, we do bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-fourth day of August, A. D. 1914.

Now therefore, the condition of this obligation is such that if the above-named Naylor & Company shall prosecute the aforesaid action

to effect and answer all damages and costs that may be awarded against it if it fails to make its plea good, then this obligation to be void, otherwise, to remain in full force and virtue.

NAYLOR & CO., *In Liquidation,*
[SEAL.] By WM. H. MILLS, *Liquidator.*

Attest:
H. SHELDON TIEL,
Res. Ass't Secretary.

AMERICAN SURETY COMPANY OF NEW YORK,
By HARRIS J. LATTA,
Resident Vice President.

Approved.
MAHLON PITNEY,
Associate Justice Supreme Court of the United States.

Endorsed: No. 1708. Bond on Justification on Appeal to Supreme Court. Received & Filed Aug. 24, 1914. Saunders Lewis, Jr., Clerk.

114 *Justification of Surety.*

STATE OF PENNSYLVANIA,
City of Philadelphia:

On this 24th day of August 1914, before me, a Notary Public of the Commonwealth of Pennsylvania, residing in the city of Philadelphia, personally appeared Harris J. Latta Resident Vice-President of the American Surety Company of New York, elected at a meeting of the Board of Trustees, held January 20, 1914, with whom I am personally acquainted, who being by me duly sworn, said that he resided in the city of Philadelphia; that he is Resident Vice-President of the American Surety Company of New York; that he knew the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the order of the Board of Directors of said Company, and under and by virtue of the by-laws of said Company; that he signed said instrument as Resident Vice-President of said Company by like authority; and that the attached statement of the assets and liabilities of the said Company is correct and true, and that the said Company has not since the thirty-first day of December, sustained any losses affecting its financial condition.

And the said Harris J. Latta further said that he was acquainted with H. Sheldon Tiel, and knew him to be the Resident Assistant Secretary of said Company; that the signature of the said H. Sheldon Tiel subscribed to the said instrument is in the genuine handwriting of the said H. Sheldon Tiel, and was thereto subscribed by the like authority of the said Board of Directors, and in the presence of him the said Harris J. Latta Resident Vice-President aforesaid.

And the said Harris J. Latta further said that the said Company has complied with the requirements of the Act of Congress, entitled "An Act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon," approved August 13th, 1894, and has been granted authority in writing by the Attorney-General of the United States to do business thereunder, and has appointed Robert R. Benedict as its Attorney for the Third Circuit.

Sworn and Subscribed before me, this 24th day of August, A. D. 1914.

[SEAL.] M. ELVA NEVILLE,
Notary Public.

Commission Expires Feb. 26, 1917.

203 West End Trust Bldg., Philadelphia.

115 STATE OF NEW YORK,
County of New York, ss:

H. M. Goff being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

H. M. GOFF.

Subscribed and sworn before me this 13th day of July, 1914.

[Seal E. A. Farrell, Notary Public, New York County, N. Y.]

E. A. FARRELL,
Notary Public, New York County, No. 1058.

Register's office, New York County, No. 5015
Certificate filed in all Counties.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you or some of you, between J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, Co-partners, trading under the firm name of Naylor and Company, Plaintiffs in Error, and Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; New York Central and Hudson River Railroad Company; Philadelphia and Reading Railway Company; Central Railroad Company of New Jersey; Delaware, Lackawanna and Western Railroad Company, Defendants in Error, a manifest error hath happened, to the great damage of the said J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, Co-partners, trading under the firm name of Naylor and Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same within thirty days, in the said Supreme Court of the United States, at the City of Washington, District of Columbia, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct
117 that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the twenty-fourth day of August, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of above Court.]

(Signed) WM. P. ROWLAND,
Deputy Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed.

(Signed) MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

Endorsed: No. 1807. Writ of Error from Supreme Court. Received & Filed Sept. 19, 1914. Saunders Lewis, Jr., Clerk.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lehigh Valley Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, New York Central and Hudson River Railroad Company, Philadelphia and Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the United States, wherein J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, Co-partners, trading under the firm name of Naylor and Company, are Plaintiffs in Error, and you are Defendant- in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of August, in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.]

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

119 & 120 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Lehigh Valley Railroad Company, et al., Plaintiffs in Error, vs. J. Mitchell Clark, William H. Mills, and J. Armstrong Rawlins, co-partners, trading under the firm name of Naylor & Company, Defendants in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this nineteenth day of September in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

121 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you or some of you, between J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, Co-partners, trading under the firm name of Naylor and Company, Plaintiffs in Error, and Lehigh Valley Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; New York Central and Hudson River Railroad Company; Philadelphia and Reading Railway Company; Central Railroad Company of New Jersey; Delaware, Lackawanna and Western Railroad Company, Defendants in Error, a manifest error hath happened, to the great damage of the said J. Mitchell Clark, William H. Mills and J. Armstrong Rawlins, Co-partners, trading under the firm name of Naylor and Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same within thirty days, in the said Supreme Court of the United States, at the City of Washington, District of Columbia, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done
122 therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the twenty-fourth day of August, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. P. ROWLAND,
Deputy Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed:
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

123 [Endorsed:] 1708. Writ of Error from Supreme Court. Received & Filed Sep. 19 1914. Saunders Lewis, Jr., Clerk.

124 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Henkel, Marshal for the United States Court for the Southern District of New York being duly sworn according to law depose and say that I served a copy of the citation on the 21st day of September, 1914 in the above case upon Dwight W. Pardee, Secretary of the New York Central and Hudson River Railroad Company by handing the same to him, personally, at 452 Lexington Avenue in the City of New York in the Southern District aforesaid, and that I also handed a true copy on September 21st, 1914 of said citation to George O. Waterman, secretary and treasurer of the Central Railroad Company of New Jersey at 142 Liberty Street in the City and district aforesaid.

WILLIAM HENKEL,
U. S. Marshal.

Sworn to and subscribed before me this 24th day of September A. D. 1914.

[Seal of Frederick L. Campbell, Notary Public, Kings County.]

FREDERICK L. CAMPBELL,
Notary Public, Kings County, No. 187.

Certificate filed in New York County; No. 61, New York County; Register's No. 5164, New York County; Register's No. 6178, Kings County.
My Commission Expires March 30, 1915.

125 [Endorsed:] File No. 24,375. Supreme Court U. S. October term, 1914. Term No. 631. J. Mitchell Clark et al., Pl'ffs in Error, vs. Lehigh Valley Railroad Company et al. Proof of service of citation. Filed November 21, 1914.

Endorsed on cover: File No. 24,375. U. S. Circuit Court Appeals, 3d Circuit. Term No. 631. William H. Mills, as surviving partner & liquidator of J. Mitchell Clark, William H. Mills, and J. Armstrong Rawlins, copartners, trading under the firm name of Naylor & Company, plaintiff in error, vs. Lehigh Valley Railroad Company, Buffalo, Rochester and Pittsburgh Railway Company, New York Central and Hudson River Railroad Company, et al. Filed September 23d, 1914. File No. 24,375.

In the Supreme Court of the United States.

October Term, 1914.

No. 331.

J. MITCHELL CLARK, WILLIAM H. MILLS AND WILLIAM M. HOES, ADMINISTRATOR OF J. ARMSTRONG RAWLINS (DECEASED), CO-PARTNERS TRADING UNDER THE FIRM NAME OF NAYLOR & CO., PLAINTIFFS IN ERROR,

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL., DEFENDANTS IN ERROR.

In Error to the Circuit Court of Appeals of the United States for the Third Circuit.

MOTION TO ADVANCE FOR ARGUMENT.

FRANK VAN SANT,
ARTHUR R. THOMPSON,
V. F. GABLE,
Attorney for Plaintiffs-in-Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 631.

J. MITCHELL CLARK, WILLIAM H. MILLS AND WILLIAM M. HOES, ADMINISTRATOR OF J. ARMSTRONG RAWLINS (DECEASED), CO-PARTNERS TRADING UNDER THE FIRM NAME OF NAYLOR & CO., PLAINTIFFS IN ERROR,

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL., DEFENDANTS IN ERROR.

To the Honorable the Chief Justice and Associate Justices of The Supreme Court of the United States:

STATEMENT.

The plaintiffs in error in this case, upon a rehearing of their claim before the Interstate Commerce Commission, obtained an order for reparation against the defendants in error, and brought suit against the said defendants in error in the United States District Court for the Eastern District of Pennsylvania for the enforcement of said order under and by virtue of the 16th Section of the Interstate Commrece Act as amended. The cause came on for trial before a jury, all parties being in court by their respective attorneys. Upon the offer of the

plaintiffs, and over the objection of defendants, the reports and orders of the Interstate Commerce Commission on which the suit was based were admitted as *prima facie* evidence. The testimony of only one witness was offered by the plaintiffs to show that the reparation as awarded by the Commission had not as yet been paid by the defendants, as to parties composing the firm appearing as plaintiffs, and complainants before the Interstate Commerce Commission. The defendants offered no evidence whatever. The above-mentioned reports and orders of the Commission were read and explained to the jury by the Court, as well as the Interstate Commerce Act in so far as the same was applicable thereto. The Court's charge to the jury concluded with the following words: "And you will therefore say whether or not the plaintiff is entitled to recover the amount of money claimed against each railroad respectively." The defendants requested the court to instruct the jury that under all the evidence their verdict must be for the defendants This was refused.

The jury returned a verdict for and in favor of the plaintiffs ($9,-044.54), against the defendants and thereupon the defendants moved the court for a judgment *non obstante veredicto* in their favor, which was refused by the court, and judgment for the plaintiffs upon the verdict ordered to be entered. Said judgment included an allowance of counsel fees in accordance with the provision of the Interstate Commerce Act, in amount $2,000, apportioned $1,000 for proceedings before District Court and $1,000 for proceedings before Interstate Commerce Commission.

The defendants in error herein sued out a Writ of Error, which was duly heard in the Circuit Court of Appeals for the Third Circuit, which Honorable Court, after due hearing on the assignments of error rendered the following judgment: "We think for the reason stated, the assignment of error, based on the exception of the refusal of the Court to give binding instructions in favor of the defendant companies must be sustained, and the judgment of the Court below reversed with costs. And it is so ordered." Which judgment was duly entered in the judgment roll of the trial court.

At no time was a motion for a new trial, or a rehearing presented either in the trial court, or the Appellate Court.

MOTION TO ADVANCE.

Now come the plaintiffs in error in the above entitled cause pending before this Honorable Court on Writ of Error issued and directed to the United States Circuit Court of Appeals for the Third Circuit, by their attorneys, Frank Van Sant, Arthur R. Thompson and V. F. Gable, and respectfully move that said cause be advanced to the summary docket for hearing and argument for the following reasons:

> *All of the assignments of error and material points involved in this case were recently decided by this Honorable Court in the following cases:* Henry E. Meeker *vs.* Lehigh Valley R. R. Co., No. 434, decided February 23, 1915; Baer Brothers Mercantile Company *vs.* Denver and Rio Grande R. R. Co., No. 140, decided April 27, 1914, 233 U. S., 479, and Slocum *vs.* New York Life Insurance Company, decided April 21, 1913, 228 U. S., 364.

The attention of this Honorable Court is respectfully directed more particularly to its decision in the above-mentioned Meeker case, in which the following assignments of error and material points were decided, and which also are raised as assignments of error in the case now sought to be advanced for argument:

1.

The admission in evidence of the reports and orders of the Interstate Commerce Commission awarding reparation for the exaction and collection of unreasonable rates in a suit and claim for damages in a Federal Court for the enforcement of such reparation order as is provided for by Section 16 of the Interstate Commerce Commission Acts, and its amendments.

2.

Whether these reports of the Interstate Commerce Commission are to be taken as *prima facie* evidence of facts stated by them, and whether the facts of which such reports and orders are the *prima facie* evidence, are sufficient, in the absence of countervailing evidence by the defendant, to maintain the plaintiff's suit and claim for damages in a Federal Court.

3.

Whether such reports and orders of the Interstate Commerce

Commission are *prima facie* evidence of the liability of the defendants for reparation, as set forth in the order, in the absence of countervailing evidence by the defendant.

4.

Whether the trial court, in which the plaintiffs were proceeding to enforce the reparation order of the Interstate Commerce Commission, as provided for under Section 16 of the Interstate Commerce Commission Act as amended, erred in admitting as *prima facie* evidence the reports and orders of said Commission over the objection of the defendants.

5.

Whether the trial court erred in refusing to issue binding instructions to the jury to find for the defendants.

6.

Whether the trial court erred in refusing to grant a motion on the part of the defendants for a judgment *non obstante veredicto* in their favor after the jury had rendered a verdict for the plaintiffs.

7.

Whether the reparation order of the Interstate Commerce Commission contains sufficient finding of facts to sustain an award for damages or reparation under the Interstate Commerce Act, as amended.

In the Meeker case cited *supra*, this Honorable Court, in the opinion rendered by Mr. Justice Van Devanter, set forth what it considered should be the essentials of a reparation order of the Interstate Commerce Commission in order to sustain an award for damages, which are as follows: (1) The relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of traffic out of which the claims arose; (3) the rates paid by the shipper for the services rendered, and whether they were according to the established tariff; (4) whether, and in what way unjust discrimination was practiced against the shipper, covering the period involved; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper, covering the period involved, was excessive and unreason-

able, and, if so, what would have been a reasonable rate for the service, and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby and if so, the amount of his damages.

In view of the fact that the Meeker case, *supra*, involved a claim for reparation based on unjust discrimination, as well as a claim for reparation on unreasonable rates, only such essentials as are referred to in the preceding paragraph as applicable to the claim based on unreasonable rates are also applicable to the reparation order in the case herein sought to be advanced for argument.

The orders and reports of the Interstate Commerce Commission forming part of the record in the case now sought to be advanced for argument and on file in the Clerk's office of this Honorable Court, are attached to and made part of this motion marked "A" and "B," for the purpose of comparison of the same with the reports and orders of the Interstate Commerce Commission in the Meeker case cited *supra*.

FRANK VAN SANT,
ARTHUR R. THOMPSON,
V. F. GABLE,
Attorneys for Plaintiffs in Error.

REPORTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

"A."

No. 1511.

NAYLOR & COMPANY

v.

LEHIGH VALLEY RAILROAD COMPANY ET AL.

Submitted November 25, 1908. Decided January 5, 1909.

Defendants' rate on pyrites cinder should not exceed their rate on iron ore from Buffalo, N. Y., to points in Pennsylvania and New Jersey. Reparation denied.

Douglas, Leckie & Thompson for complainant.

Charles Heebner and *J. D. Campbell* for Philadelphia & Reading Railway Company.

Henry W. Clark for Lehigh Valley Railroad Company.

Henry Wolf Bikle for Pennsylvania Railroad Company.

Harris, Havens, Beach & Harris for Buffalo, Rochester & Pittsburg Railway Company.

Edgar H. Boles for New York Central & Hudson River Railroad Company.

J. D. Campbell for Philadelphia & Reading Railway Company.

J. L. Seager for Delaware, Lackawanna & Western Railroad Company.

REPORT OF THE COMMISSION.

LANE, *Commissioner:*

This complaint involves the reasonableness of the rate of $2 per gross ton on pyrites cinder over the lines of defendant companies from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey.

Iron pyrites is a high-grade ore containing a large percentage of both sulphur and metallic iron. It is imported, chiefly from Spain, by fertilizer and chemical works located in this country. At these works this ore is burned in specially constructed furnaces, and from

the arising sulphuric fumes sulphuric acid is obtained. The resultant product, pyrites cinder, contains approximately 60 per cent of iron and a small residue of sulphur, usually from 1 to 3 per cent, the amount of residue determining the value of cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore. This pyrites cinder, the rate upon which complainants claim to be excessive, is shipped to blasting furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron. It is alleged by the complainants that pyrites cinder being a low-grade commodity, valued at about $1 per gross ton at Buffalo,

is unable to move at the $2 per ton rate; the output at the chemical works at Buffalo being from 20,000 to 25,000 tons per year, only one-quarter of which is sold. Pyrites cinder is also produced at chemical works in Bayonne, N. J., where it is valued at $2 per ton, the difference between the value at Buffalo and the value at Bayonne being, it is claimed, accounted for because of the difference in freight rate to points of destination in New Jersey and Pennsylvania. This fact is emphasized by complainants that the iron pyrites bears a rate from New York, Philadelphia, and Baltimore to Buffalo of but $1.40 per ton, while the pyrites cinder for a return haul of but a part of the distance bears a rate of $2 per ton, the cheaper commodity for a shorter haul being charged a greater amount than the higher grade commodity for a longer haul.

The contention of the defendants by way of answer is that pyrites cinder should take a higher rate than iron ore between the same points, owing to the longer time consumed in loading the former than the latter, and because iron ore is consumed in greater quantities than pyrites cinder. It appears that it does in fact take much less time to load iron ore than pyrites cinder, and a carload of iron ore is slightly heavier than a load of pyrites cinder. The rate on iron ore is $1.45 per ton to points of destination carrying a $2 rate on pyrites cinder.

We are of the opinion that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of January, A. D. 1909.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
Commissioners.

No. 1511.

NAYLOR & COMPANY

v.

LEHIGH VALLEY RAILROAD COMPANY; PENNSYLVANIA RAILROAD COMPANY; BUFFALO, ROCHESTER & PITTSBURG RAILWAY COMPANY; NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; PHILADELPHIA & READING RAILWAY COMPANY; CENTRAL RAILROAD COMPANY OF NEW JERSEY, AND DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon;

It is ordered, That the above-named defendant carriers be, and they are hereby, notified and required to establish and put in force on or before the 25th day of February, 1909, and maintain in force thereafter during a period of not less than two years, and apply to the transpor-

tation of pyrites cinder, in carloads, from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey, no higher rates than are in force over their lines on iron ore between said points. Said rates may be made effective upon three days' notice to the public and to the Interstate State Commerce Commission, given in the manner required by law, and the tariffs must contain notation that they are issued under the authority hereby granted and must refer to the title and number of this case.

It is further ordered, That complainants' claim for reparation in this proceeding be, and the same is hereby, disallowed.

[SEAL.]

(Duly certified.)

"B."

No. 1511.

NAYLOR & COMPANY

v.

LEHIGH VALLEY RAILROAD COMPANY ET AL.

Decided June 2, 1910.

43908—10

No. 1511.

NAYLOR & COMPANY

v.

LEHIGH VALLEY RAILROAD COMPANY ET AL.

Submitted May 6, 1910. Decided June 2, 1910.

Reparation awarded for the collection of unreasonable charges on shipments of pyrites cinder from Buffalo, N. Y., to points in Pennsylvania and New Jersey.

Thompson & Van Sant for complainant.

Edgar H. Boles for Lehigh Valley Railroad Company; Delaware, Lackawanna & Western Railroad Company; New York Central & Hudson River Railroad Company; and Philadelphia & Reading Railway Company.

James S. Havens and *Samuel M. Havens* for Buffalo, Rochester & Pittsburg Railway Company.

REPORT OF THE COMMISSION ON REHEARING.

LANE, *Commissioner:*

In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. *Naylor & Co.* v. *L. V. R. R. Co.*, 15 I. C. C. Rep., 9.

Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.

We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations. *Detroit Chemical Works* v. *N. C. Ry. Co.*, 13 I. C. C. Rep., 357; *Same* v. *Erie R. R. Co.*, 13 I. C. C. Rep., 363.

The Buffalo, Rochester & Pittsburg Railway Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,846.55, with interest from November 21, 1907, as reparation for the collection of unreasonable charges on 189 carloads of pyrites cinder aggregating 5,175 1590/2240 tons in weight moving from Buffalo to various Pennsylvania points.

The New York Central & Hudson River Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $248.93, with interest from April 19, 1907, as reparation for the collection of unreasonable charges on 13 carloads of pyrites cinder aggregating 452 1370/2240 tons in weight, moving from Buffalo to various Pennsylvania points.

The Delaware, Lackawanna & Western Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $487.52, with interest from September 23, 1907, as reparation for the collection of unreasonable charges on 31 carloads of pyrites cinder aggregating 886 960/2240 tons in weight, moving from Buffalo to Newark, N. J.

The Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $1,024.15, with interest from November 13, 1907, as reparation for collection of unreasonable charges on 74 carloads of pyrites cinder aggregating 1,862 220/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

The Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,362.23, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 172 carloads of pyrites cinder aggregating $4,295\frac{30}{2240}$ tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

It will be ordered accordingly.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2d day of June, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
Commissioners.

No. 1511.

NAYLOR & COMPANY

v.

LEHIGH VALLEY RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; BUFFALO, ROCHESTER & PITTSBURGH RAILWAY COMPANY; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; PHILADELPHIA & READING RAILWAY COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; AND THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

This case being at issue upon motion for rehearing on reparation, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report

containing its findings of fact and conclusions thereon, which said report is made a part hereof:

It is ordered, That defendants Buffalo, Rochester & Pittsburgh Railway Company and Philadelphia & Reading Railway Company be, and they are hereby, authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $2,846.55, with interest thereon at the rate of 6 per cent per annum from November 21, 1907, as reparation for an unreasonable rate charged for the transportation of 189 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendants The New York Central & Hudson River Railroad Company and Philadelphia & Reading Railway Company be, and they are hereby, authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $248.93 with interest thereon at the rate of 6 per cent per annum from April 19, 1907, as reparation for an unreasonable rate charged for the transportation of 13 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendants The Delaware, Lackawanna & Western Railroad Company and The Central Railroad Company of New Jersey be, and they are hereby, authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $487.52, with interest thereon at the rate of 6 per cent per annum from September 23, 1907, as reparation for an unreasonable rate charged for the transportation of 31 carloads of pyrites cinder from Buffalo, N. Y., to Newark, N. J., which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by report of the Commission.

It is further ordered, That defendants, Lehigh Valley Railroad Company and The Central Railroad Company of New Jersey be, and they are hereby, authorized and directed, on or before the 1st day of August,

1910, to pay unto the complainant, Naylor & Company, the sum of $1,024.15, with interest thereon at the rate of 6 per cent per annum from November 13, 1907, as reparation for an unreasonable rate charged for the transportation of 74 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania and New Jersey, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said reports of the Commission.

And it is further ordered, That defendants Lehigh Valley Railroad Company and Philadelphia & Reading Railway Company be, and they are hereby, authorized and directed, on or before the 1st day of August, 1910, to pay unto the complainant, Naylor & Company, the sum of $2,362.23, with interest thereon at the rate of 6 per cent per annum from November 13, 1907, as reparation for an unreasonable rate charged for the transportation of 172 carloads of pyrites cinder from Buffalo, N. Y., to various points in Pennsylvania and New Jersey, which rate so charged has been found by the Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

[SEAL.]

(Duly certified.)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 631.

J. MITCHELL CLARK, ET AL., PLAINTIFFS-IN-ERROR,

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL., DEFENDANTS-IN-ERROR.

EDGAR H. BOLES, ESQ.,
HENRY S. DRINKER, JR., ESQ.,
JAMES F. CAMPBELL, ESQ.,
ABRAHAM M. BEITLER, ESQ.,
JOHN G. JOHNSON, ESQ.,
J. W. BAYARD, ESQ.,
Attorneys for Defendants-in-Error.

Please take notice that the Plaintiffs-in-Error will, on the 12th day of April, A. D. 1915, or as soon thereafter as counsel can be heard, submit to the United States Supreme Court a motion to advance the above entitled cause now pending on a Writ of Error, for argument and hearing.

FRANK VAN SANT,
ARTHUR R. THOMPSON,
V. F. GABLE,
Attorney for Plaintiffs-in-Error.

Washington,
April 6th, 1915.

Service accepted this ..... day of April, A. D. 1915.

INDEX.

POINTS.

AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 631.

WILLIAM H. MILLS, AS SURVIVING PARTNER AND LIQUIDATOR OF J. MITCHELL CLARK AND J. ARMSTRONG RAWLINS, DECEASED, TRADING UNDER THE FIRM NAME OF NAYLOR AND COMPANY, PLAINTIFF IN ERROR,

vs.

THE LEHIGH VALLEY RAILROAD COMPANY ET AL., DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Statement.

Writ of error to review a judgment of reversal, directed by the Circuit Court of Appeals for the Third Circuit, reversing a judgment in favor of the plaintiff in error for $9,044.54, entered upon a

NOTE.—The page numbers prefixed by a star refer to the Record. "Act" refers to the "Act to Regulate Commerce" as amended.

verdict rendered in an action brought under section 16 of the "Act to Regulate Commerce" in the United States District Court for the Eastern District of Pennsylvania to recover damages upon a report and order of the Interstate Commerce Commission awarding reparation.

The plaintiff in error, hereinafter referred to as the "plaintiff," is the surviving partner of J. Mitchell Clark and J. Armstrong Rawlins, both deceased copartners, trading under the firm name of Naylor and Company, with its principal place of business at No. 45 Wall street, New York city, New York.

On divers occasions during the years 1906 and 1907 the plaintiff shipped pyrites cinder from Buffalo, New York, over the following railroads, to wit: Lehigh Valley, Buffalo, Rochester and Pittsburgh, New York Central and Hudson River, Philadelphia and Reading, Central Railway of New Jersey, and Delaware and Lackawanna, and their connections, to points of destination in Pennsylvania and New Jersey, at a published tariff freight charge of two dollars ($2.00) a ton, exacted and collected by each of the said defendant carriers from the plaintiff, on all shipments made over their respective lines during the period of time above mentioned.

On April 4, 1908, the plaintiff duly filed a complaint with the Interstate Commerce Commission attacking the aforesaid rate of two dollars ($2.00) a gross ton on pyrites cinder as excessive, unjust,

unreasonable, unduly discriminatory and therefore in violation of the "Act to Regulate Commerce," praying that the defendant be ordered to desist from exacting and collecting such unreasonable rate from and to points of origin and destination aforesaid; that a lower rate be put in effect and that reparation be granted to the plaintiffs (p. *7). This complaint was accompanied by a copy of Exhibit A (pp. *10-23), which exhibit discloses the date, number of car, weight, origin, destination, and freight paid on all shipments *giving rise to the complaint*. Each of the defendants in error, hereinafter referred to as "defendants," being duly served with a copy of said complaint, made answer thereto, issue was joined and the cause regularly heard on briefs and oral argument by all parties thereto, and submitted November 28, 1908, resulting in a finding, duly filed and reported by the Interstate Commerce Commission at a general session in its offices in Washington, January 5, 1909, docket No. 1511, opinion No. 746, ordering the said two dollar ($2.00) rate on pyrites cinder reduced to a rate not to exceed $1.45 per gross ton, from points of origin to points of destination hereinabove named, said order not to take effect later than February 25, 1909.

The defendants duly complied with the aforesaid order of the Interstate Commerce Commission, and on or before February 25, 1909, established and put into effect the aforesaid reduced transportation rate on pyrites cinder from Buffalo,

New York, to points on their respective lines in Pennsylvania and New Jersey.

On May 8, 1909, the plaintiffs duly filed with the Interstate Commerce Commission at Washington, D. C., a motion for rehearing on the question of reparation alone, pursuant to the aforesaid order of the Commission January 5, 1909 (p. *27), a copy of which was attached to said motion; this motion was regularly and duly granted at a regular session of the Commission on November 9, 1909. Due notice of the granting of said motion was given to all parties interested who appeared at the taking of additional testimony and evidence by the plaintiffs; both sides were heard on briefs submitted and oral argument made in general session of the Commission on May 6, 1910, which resulted in a finding, regularly and properly made by the Interstate Commerce Commission at a general session held June 2, 1910, ordering and authorizing the defendants and each of them to pay the reparation to the plaintiffs, as fully appears in the certified copy of said report and order of the Commission on the rehearing, opinion No. 168, docket No. 1511, dated June 2, 1910 (pp. *26-29).

A true copy of the aforesaid report and order of the Interstate Commerce Commission on the rehearing, being opinion No. 168, docket No. 1511 (pp. *26-29), was duly served upon each of the defendants and demand made that they pay to the plaintiffs the amount of reparation authorized and directed by the Interstate Commerce Commission

to be paid by them to the plaintiffs as set forth in the aforesaid report and order.

The above-mentioned defendant carriers not having complied with the aforesaid reparation order of the Interstate Commerce Commission in the time designated by the "Act to Regulate Commerce" as amended, the plaintiffs, under and by virtue of the provisions of sections 14 and 16 of said "Act," duly filed a petition in the United States District Court for the Eastern District of Pennsylvania, on May 31, 1911, for the enforcement of the aforesaid reparation order against the defendant carriers, and for the collection of the same from them as damages alleged to have been sustained as a result of exacting and collecting from plaintiffs the unreasonable rates on shipments made. In this petition all of the facts entitling the plaintiff to recover damages were fully pleaded, and the certified copies of the reports and orders of the Commission, marked docket No. 1511, opinion numbers 746 and 168, respectively, were annexed as exhibits, also Exhibit "A" as to shipments, and made a part of the petition.

Issue was joined by each of the defendants in a plea of general denial (pp. *29-30).

The action came on for trial before Judge Holland, and a jury duly sworn or affirmed to try the issues joined (p. *30), on October 21, 1912. Upon the offer of the plaintiff and over the objection of the defendants the aforesaid reports and orders of the Commission, Nos. 746 (pp. *33-37) and 168 (pp.

*37-40), respectively, were admitted by the court as *prima facie* evidence of plaintiff's right to recovery (pp. *31-33). Testimony of one witness only was offered by the plaintiff, which witness, after being duly sworn, testified that he was in the employ of Naylor and Company, who were the plaintiffs in the case at bar, being the same who had presented the complaint before the Interstate Commerce Commission, No. 1511 on the docket of that Commission; that the names of the members comprising the copartnership, trading under the name of Naylor and Company, were William H. Mills, J. Mitchell Clark, and J. Armstrong Rawlins, and that the defendants had not paid to the plaintiffs, or either of them or their representative, the reparation, or any part thereof, as awarded by the Interstate Commerce Commission (p. *31). There was no cross-examination, nor did the defendants offer any testimony or evidence whatsoever in rebuttal; their motion for binding instructions being refused, they rested their case (p. *41).

The plaintiffs asked the court for an allowance, in addition to the amount claimed of a reasonable counsel fee as provided for by the "Interstate Commerce Act" as amended, the same to be taxed and collected as part of the costs in the suit (p. *41).

The learned court in its charge to the jury read the sections of the "Interstate Commerce Act," as amended, applicable to the case at bar as well as

the reports and orders of the Interstate Commerce Commission, admitted as *prima facie* evidence and explained to the jury the meaning of the evidentiary character given to such reports and orders by the said "act," concluding with the words, "You will therefore say whether or not the plaintiff is entitled to recover the amount of money claimed against each railway respectively" (pp. *41-43).

By direction of the court an exception was noted for the defendants to its refusal to charge the jury as follows: (P. *43) "Under all the evidence your verdict must be for the defendants."

The jury returned a verdict in favor of the plaintiffs and against the defendants for the amount of reparation or damages as set forth in the report and order of the Commission No. 168, aggregating $9,044.54 (p. *30), whereupon the defendants moved the court for judgment *non obstante veredicto* in their favor, which motion the learned court dismissed (p. *43). Judgment was ordered to be entered for the plaintiffs on the verdict. To which dismissal of said motion and the entry of said judgment the court granted an exception on motion of the defendants (pp. *44-45).

The learned court allowed counsel fees for plaintiff—$1,000 for their services to the plaintiffs in the proceeding before the Interstate Commerce Commission, and a further fee of $1,000 for their services for the plaintiffs in the proceedings at bar (p. *45).

To the allowance of said counsel fee for services

before the Interstate Commerce Commission, the court granted an exception on motion of counsel for the defendants.

The counsel for the defendants excepted to the charge and opinion of the court, which exception, by direction of the court, was noted.

The necessary orders were given by the learned court in compliance with the aforesaid proceedings in this cause. On October 31, 1912, after filing the precipe for judgment, judgment was finally entered in favor of the plaintiffs and against the defendants in this cause upon the verdict of the jury (p. *46).

On November 9, 1912, the defendants' petition for a writ of error in the United States Circuit Court of Appeals for the Third Circuit was granted. Proofs were submitted and argument heard by all parties on the writ of error in March, 1913.

The United States Court of Appeals for the Third Circuit in its opinion (p. *64, margin 96) reversed the judgment of the trial court on the following grounds (Fed. Rep., 207, p. 717):

> 1. "That there were no sufficient findings of facts in the reports, as required by the statute."
>
> 2. "That it was doubtful whether the findings contained in the original report could be considered in connection with the second report and the order of reparation, but if they could be considered the findings were not sufficient to support plaintiff's claim or make out a *prima facie* case of damage."

There was no direction to the trial court for a *venire de novo.*

On the 6th day of August, 1914, Mr. Justice Pitney, of the United States Supreme Court, granted a petition for writ of error by the plaintiffs, directed to the United States Circuit Court of Appeals of the Third Circuit. The plaintiffs' motion to advance for arguments to the summary docket was granted by this honorable court on April 12, 1915, which action now brings the case here.

Assignments of Error.

(pp. *71-74.)

1.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania.

2.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania and failing to award a *venire facias de novo.*

3.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the findings or inquiry of the Interstate Commerce Commission embodied in its reports and orders *per se* and alone were not sufficient to justify a verdict in favor of plaintiff in the United States District Court for the Eastern District of Pennsylvania in a case under section 16 of the Act to Regulate Commerce, approved February 4, 1887, as amended, there being no evidence offered for defendants.

4.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that there were not sufficient findings of fact made by the Interstate Commerce Commission in the two reports and orders filed of record and given in evidence in the above-entitled case; said court did not remand the said reports and orders to the Interstate Commerce Commission for further proceedings and further findings of fact.

5.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the defendants in error, your petitioners, failed to produce *prima facie* evidence showing damage sustained by them from the plaintiffs in error.

6.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the ruling of the United States District Court for the Eastern District of Pennsylvania on the request of plaintiffs in error (defendants in trial court) for binding instruction, which was as follows:

> "Under all the evidence your verdict must be for the defendants,"

which instruction was properly refused by the trial court.

7.

The United States Circuit Court of Appeals for the Third Circuit erred in holding the plaintiffs in error (defendants in district court) were not put to a reply to the *prima facie* case made by defendants in error (plaintiffs in the trial court).

8.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that other evidence should have been produced by plaintiffs in error to show damage in some other amount than as found and awarded as reparation by the Interstate Commerce Commission based upon the collection of the unreasonable rate.

9.

The United States Circuit Court of Appeals for the Third Circuit erred in its construction of the Act to Regulate Commerce, approved February 4, 1887, as amended, and applied section 8 thereof to the case at bar instead of section 16 thereof, under which the suit was brought.

10.

The United States Circuit Court of Appeals for the Third Circuit erred in its conclusions:

(*a*) That a suit brought by one in whose favor the Commission has made an award of damages by way of reparation, under section 16 of the act is not a suit on the award *qua* award.

(*b*) That the petition, reports and orders of the Interstate Commerce Commission were not sufficiently clear and sufficiently definite.

11.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the first report and order of the Interstate Commerce Commission, introduced in evidence and passed upon by the jury, was not to be considered as part of the case.

12.

The United States Circuit Court of Appeals for the Third Circuit erred in holding that the facts submitted to the jury, being the *prima facie* case made by the two reports and orders of the Interstate Commerce Commission on which the verdict was rendered, were not facts and in substituting its verdict thereon in lieu of that of the jury.

13.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment and the allowance by the district court of counsel fees taxed as part of the costs in it as provided by the statute.

14.

The United States Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the District Court and in not allowing plaintiff in error reasonable counsel fees, to be taxed as part of the costs for services of counsel in the said Circuit Court of Appeals.

15.

Wherefore the said J. Mitchell Clark, William H. Mills, and J. Armstrong Rawlins, copartners,

trading under the firm name of Naylor and Company, defendants in error, pray that for the errors aforesaid, and other errors appearing in the record of the said United States Circuit Court of Appeals for the Third Circuit in the above-entitled cause to the prejudice of the defendants in error, the said judgment of the United States Circuit Court of Appeals for the Third Circuit be reversed and for naught held, and that the judgment of the United States District Court for the Eastern District of Pennsylvania be affirmed, or for such further proceedings in said cause as may be determined upon by this honorable court to the end that justice may be done in the premises.

POINTS.

First.

Requirements of the "Act."

Section 14 of the Interstate Commerce Act as amended requires that when a complainant is awarded reparation the report of the Commission shall include the findings of fact on which the award is made.

This requirement is general and does not specifically oblige the Commission to adhere to any particular form or phraseology in expressing its findings of fact as a premise to its award for reparation, nor does it prescribe the extent of the inclusion. The Act does not require any of the members of the Commission to be lawyers, and indeed, this honorable court has referred to reports and orders not being expressed in exactly the same way that a court or judge would express an opinion in a given case. The Commission has been left to follow the form and extent of expression in its reports and orders that it has always deemed to be in compliance with the requirements of the Act and those reports and orders have always taken on practically the same form and method of expression as was employed in the reports and orders in the case at bar. As long as the findings of fact

disclose a proper basis for the award, the Act in this respect has been complied with.

This honorable court, speaking through Mr. Justice Van Devanter, in its opinion in the case of Meeker *vs.* Lehigh Valley Railroad Company, decided February 23, 1915 (236 U. S., 749), stated what "essentials" a reparation order and report should contain in order to meet the requirements of the Act and sustain the award of the Commission. We understand that the essentials are those elements that go to the heart of the issue and make up the substance, and without which in one form or another it could not exist.

Inasmuch as the Meeker case involved reparation based on unjust *discrimination,* and reparation based on the exaction of an *unreasonable rate,* the first five of the "essentials" described in that case by this honorable court, we think, applied to the former, *i. e., discrimination,* and the other two applied to reparation based on the exaction of an *unreasonable rate.* Therefore, these two latter essentials, *i. e.* (No. 6), whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable, and if so, what would have been a reasonable rate for the service; and (No. 7) whether, if the rate was excessive and unreasonable, the shipper was damaged thereby, and if so, the amount of his damages, are the only ones applicable to the case at bar.

SECOND.

Reparation is Based on Unreasonable Rate.

That we are proceeding upon a reparation order based on the exaction of an unreasonable rate is manifest from an examination of the Commission's original report in this case, as rendered by Commisioner Lane, which begins with these words (page *21):

> "This complaint involves the reasonableness of the rate of $2 per gross ton on pyrites cinder over the lines of the defendant companies from Buffalo, New York, to points in the States of Pennsylvania and New Jersey."

That the reasonable rate established by the Commission ($1.45) was the same as that already applied by the same carriers to another commodity in no way impressed upon the proceedings the character of *discrimination* as used in the Act. The violation of the Act condemned in this case by the Commission was purely the one of section 1 of the Act.

In the universally accepted meaning of the word *discrimination* every unreasonable rate works a discrimination against the shipper from whom it is collected if other shippers are paying a reasonable rate for the same transportation service, but the *discrimination* contemplated by the Act is such as applies not only to the same service but to competing commodities, and opens up a wider and different field of damages.

THIRD.

The report and order of the Commission awarding reparation discloses sufficient findings of fact on which the award is based.

In this report (pp. *26-29) the Commission finds the following ultimate facts:

1st. That the rate of two dollars per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, New York to points in the States of Pennsylvania and New Jersey, was found excessive;

2d. The defendants were ordered to establish a rate applying on shipments of pyrites cinder between said points, not to exceed that contemporaneously applying on shipments of iron ore.

3d. The reparation was denied in the original report and order.

4th. The defendants reduced the rate on pyrites cinder to $1.45 per gross ton, pursuant to the Commission's order.

5th. Complainant filed a motion for rehearing upon the question of reparation which motion, after consideration, was granted.

6th. Additional evidence was taken, and the parties were heard in oral argument.

7th. That the rate of $2 per gross ton assessed and collected by the defendants on the shipments giving rise to the complaint *was unjust* and unreasonable.

(*a*) *To the extent* that it exceeded the subsequent rate of $1.45 per gross ton.

(*b*) That the complainant is entitled to reparation.

(*c*) That this reparation applies on all shipments giving rise to this complaint, and moving within the period of the statute of limitations.

8th. The Buffalo, Rochester and Pittsburgh Railway Company, and the Philadelphia and Reading Railway Company will be required to refund,

(*a*) To the complainant,

(*b*) $2,846.55,

(*c*) With interest from November 21, 1907,

(*d*) As reparation for the collection of unreasonable charges,

(*e*) On 189 carloads,

(*f*) Of pyrites cinder,

(*g*) Aggregating 5175-1590/2240 tons in weight,

(*h*) Moving from Buffalo to various Pennsylvania points.

This is typical of the findings of fact in addition to those of No. 7, *supra,* against each of the defendants, and in favor of the complainant in the report.

9th. The orders specifically direct the several railroads according to the routes over which the various shipments were made to pay the specified amount unto the complainant, Naylor and Company, on or before a date named, *as reparation* for an unreasonable rate charged for transportation of the specified number of carloads of pyrites cinder, moving from Buffalo, New York, to various points in other States. The rate so charged having been found to be unreasonable (pp. *28-29).

FOURTH POINT.

Measure of Damages.

In commenting upon the measure of damages applied by the Commission, this court in its opinion in the "Meeker" case, *supra,* stated:

> "The Commission was authorized and required by sec. 8 of the Act to Regulate Com-

> merce, to award 'the full amount of damages sustained,' and that of course was to be determined from the evidence. If it showed that the damages corresponded to the rebate in the one instance and to the overcharge in the other, the claimant is entitled to an award on that basis."

The reparation order in the case at bar clearly shows that the reparation corresponds to the overcharge, or the difference between the $2 rate and the $1.45 rate.

FIFTH.

The Commission's Report on Rehearing Based on Report of Original Hearing.

Section 16*a* of the Act provides a follows:

> "That if a decision, order, or requirement has been made by the Commision in any proceeding, any party thereto may, at any time make application for rehearing of the same or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason, therefor, be made to appear."
> * * *

The report of the Commission on the rehearing, speaking through Commissioner Lane, begins as follows (p. *25):

> "In the report made by this Commission following an inquiry into the unreasonable-

> ness of the rate of $2.00 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, New York, and points in the States of Pennsylvania and New Jersey, the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying upon shipments of iron ore between the same points. Reparation was denied. Naylor & Company *vs.* L. V. R. R. Co., 15 I. C. C. Rep., 9." * * *

It was necessary for the Commission to thus refer to the original report in order to show that it was awarding reparation on a rate that had already been found to be unreasonable in violation of the Act. Otherwise it would be placed in the anomalous position of again finding the rate to be unreasonable and possibly requiring a second presentation of this question, all of which would only mean useless repetition and unnecessarily add to the burdens of the Commission. Nowhere does the Act require such procedure.

The rehearing was confined to the question of reparation, which question had been determined adversely to the plaintiffs in the original hearing, and granted in conformity to the provisions of section 16*a* of the Act *supra*.

The report on rehearing continues with these words (p. *27):

> "Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to the $1.45, the rate on iron ore.

> The complainant, thereupon filed a motion for rehearing upon the question of reparation and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.
>
> "We now find that the rate of $2 per gross ton assessed and collected by the defendants on the shipments giving rise to the complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton." * * *

According to section 16*a supra* it was purely within the discretion of the Commission to grant or refuse the motion for a rehearing upon a sufficiency of the reasons advanced in support of same.

The defendants had their remedy for preventing the enforcement of the Commission's order reducing the rate from $2 to $1.45 a ton or of showing that the $1.45 rate might be confiscatory and that the $1.75 a ton would have been a reasonable rate, but on the contrary they complied with the order and reduced the $2 rate to $1.45 a ton.

The words "additional evidence was taken and parties were heard in oral argument" unmistakably shows that in order to justify the award for reparation *evidence in addition* to that taken in the original proceeding was necessary.

The words *"we now find* that the rate of $2 per gross ton assessed and collected by the defendants on the *shipments giving rise to the complaint*

was unjust and unreasonable *to the extent* that, it exceeded the subsequently established rate of $1.45 per gross ton," shows a "finding" in addition to, or in some way qualifying a prior 'finding," *i. e.,* we found before that this $2 rate was unreasonable and that $1.45 was the reasonable rate, but we denied reparation; however, in the light of additional evidence to that supplied at the prior hearing *we now find* the *extent* of the unreasonableness of the $2 rate which to that same extent was collected by the defendants on the *shipments which gave rise to the complaint.*

Both the original hearing and the rehearing bear the same docket number of the Commission, No. 1511.

While the court below in its opinion (p. *62) admitted that in some respects the first report and findings were part of the second report, yet inasmuch as reparation had been denied at the first hearing it concluded that the second hearing on the question of reparation alone was a distinct proceeding on that issue. It refers to the many "circumstances and considerations such as the relations between the parties, want of knowledge by the defendant companies of the facts bearing on the question of unreasonableness, lack of intention to violate the law in that respect, or lack of proof of actual damage suffered by the plaintiffs, which might influence the Commission or a jury in coming to the conclusion that the applicant was not entitled to an award of reparation or damages."

That court also found that the report on the rehearing nowhere stated what the "additional evidence" was or what the facts established by it were as required by the statute, and as a result says: "It is reasonable to conclude, therefore, that the award of reparation was made upon the facts established by the additional evidence." Here, apparently, while the court concludes that the award of reparation was made upon the facts established by the additional evidence, yet it objects to the report because it does not contain the *evidence,* or state what the facts were which the Commission found as established by the evidence.

The consideration by the Commission of any result reached by it or of questions determined by it in subsequent reports and orders is proper and regular "when its doing so is made to appear in the record and the facts thus noted are specified."

U. S. vs. B. & O. Ry. Co., 226 U. S., 14 to 20.

Section 16 of the act authorizes the Commission to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

If the finding of the Commission that the carriers had violated the act by exacting and collecting an unreasonable freight rate is conclusive, then surely the mere reference by the Commission in its report awarding reparation, to its former report, finding the rate unreasonable, was sufficient to justify the Commission in proceeding with the rehearing without making the original report a

part of the subsequent report to any greater extent or in any manner different than was adopted in this case.

SIXTH.

No Error in the Trial Court.

Section 16 of the act provides the procedure to be adopted by the complainant for the enforcement of an award for reparation by the Commission in the following words:

> "If the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, *or any person* for whose benefit such order was made may file in the Circuit Court of the United States * * * a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises." (Italics ours.)

This suit in the Circuit Court of the United States proceeds in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated.

In their petition filed with the trial court the plaintiffs in the case at bar fully pleaded all of the facts entitling it to recover damages, and attached to this petition and made part thereof the certified copies of the reports and orders of the Commission. No. 746;168, Docket No. 1511 (*4 to 29).

The plaintiffs offered in evidence the certified copies of the reports and orders of the Commission, to which offer counsel for defendants made the following objections (p. *32):

> "We object to the admission of these reports on two main grounds, and also on other relevant grounds.
>
> "We object mainly because the act of Congress requires, under section 14, that in cases where the Commission awards damages it shall find the facts on which its award is based, and in section 16 of the act the report and order of the Commission may be *prima facie* evidence as to the facts found. In these reports the Commission does not find the facts on which they base their order, but merely summarizes the evidence and proofs.
>
> "My second objection is on the ground that these cases were virtually discrimination cases. The order was based not on the fact that the rate was in itself unreasonable, but it was based upon the difference between the iron rate on the iron ore and the pyrites cinder rate, and the Commission has no power to award damages in discrimination cases; only in plain rate cases."

It is for the court to determine whether the report and order of the Commission is regularly and properly made in conformity to the requirements of the act, and if the Interstate Commerce Commission is the proper and competent tribunal to pass on rates and award reparation, then it must be presumed that its findings are in compliance

with the law, especially where nothing appears to the contrary, or the court's attention is not directed to any irregularities or defects.

The learned judge in the trial court found no irregularity or contravention of the Act in the Reports and orders of the Commission, nor were any suggested or pointed out by counsel for the defendants, they relying solely on their general objection, *i. e.,* that the reports merely summarize the evidence and proofs, but do not find the facts on which the Commission bases its order; and, second, that the order is based on discrimination for which the Commission has no power to award damages.

Counsel for defendants in stating the two grounds of their objection did not suggest to the trial court what further findings of fact the reports and orders should contain when complying with the requirements of the Act:

> "Where a party excepts to the admission of testimony he is bound to state his objections specifically and in a proceeding for error he is confined to the objection so taken. Burton *vs.* Driggs, 87 U. S., 125."
>
> Meeker *vs.* Lehigh Valley Ry. Co., 236 U. S., 749.

In the trial court the reports and orders of the Commission played the part accorded to them by the Act, *i. e., prima facie evidence,* and if the defendants were of the opinion that such reports and orders were irregular or did not supply sufficient findings of fact, it was their duty to raise their ob-

jections specifically and afford the plaintiffs an opportunity to meet them or supply additional proof or evidence in support of the reports and orders, for it cannot be presumed that plaintiffs were not prepared to proceed with the trial on the merits or to supply further evidence. Defendants should have produced the record of the case before the Commission to the court, and pointed out that the reports and orders were contrary to the evidence submitted or that such evidence could not furnish a basis for such an award, but they preferred to stand or fall on their general objection, with no effort whatever to rebut the *prima facie* case made out by the plaintiffs when they put in evidence the reports and orders of the Commission and the testimony of a witness showing that the plaintiffs in the trial court were the same as those appearing as complainants in the same case before the Commission, and that the reparation order had not as yet been complied with by the defendant carriers.

In the case of Int. Com. Com. *vs.* L. & N. Ry. Co., 227 U. S., 88, 91, this court decided the following:

> "Under the Act to Regulate Commerce the award of damages takes the place of the verdict of the jury; and findings that would support a verdict in an action at law would support an award of the Commission under the Interstate Commerce Act. The only findings that the Commission is required to make are the ultimate findings, upon which liability at law may be predicated."

Mitchell Coal Co. *vs.* Penn. Ry., 230 U. S., 247:

In the charge of the trial court to the jury the findings of fact in the Report were read as well as the sections of the Act applicable to the case at bar, *"prima facie"* was also explained and the court concluded with these words "and you will, therefore, say whether or not the plaintiff is entitled to recover the amount of money claimed against each railroad respectively."

That there was no error in the trial court's charge to the jury and that it could properly have directed a verdict for the plaintiffs is pointed out by this court in its opinion in the case of Slocum *vs.* New York Life Ins. Company, 228 U. S., 364, on page 375, where it makes the following conclusion:

> "We are accordingly of opinion that the evidence did not admit of the finding that the policy was in force at the time of the insured's death, and, therefore, that the circuit court should have granted the company's request that a verdict in its favor be directed."

If the reports and orders of the Commission were properly before the jury this evidence admitted of but one finding, *i. e.*, a verdict in favor of the plaintiff, as no evidence in rebuttal was offered.

If the reports and orders of the Interstate Com-

merce Commission awarding reparation disclose any evidence at all from which can properly emerge the ultimate findings of fact, such reports and orders are made in compliance with the requirements of the act, and to deprive them of the evidential character accorded by the 16th section of the Act, would require the court to hear and consider again the one thousand and one phases and questions of the problem of transportation, because of the complexities and intricacies of which Congress created an expert tribunal to hear and pass upon such questions to the exclusion of everything else as well as to create a uniformity in the findings of fact.

An examination of the reports of the Interstate Commerce Commission from practically the date of its creation will show that it has always required a full and exhaustive presentation of the evidence in reparation cases to the point of enabling it to determine that reparation is due to the complainant in consequence of charges found unreasonable. Otherwise it will decline to award such reparation.

Perry *vs.* F. L. Cen. Penn. Ry. Company, 5 I. C. C. Rep., 97, see page 118 (1891).

Cassell *vs.* B. & O. Ry. Company, 8 I. C. C., 333 (1899).

"The Commission has repeatedly held that where it finds the rate exacted to have been unreasonable it may award reparation by the difference between that rate and that

which is reasonable notwithstanding the former was the rate duly established by the carrier for the time being." Allen *vs.* C., M. St. P. Ry. Company, 16 I. C. C., 293; The Commercial Club of Omaha *vs.* C. & N. Ry. Company, 7 I. C. C., 386.

The Trial Court Gave the Proper Legal Effect to the Reports.

The Interstate Commerce Commission as a tribunal has measured up to the full expectations of Congress and the people in effectively administering its duties under the Act and it is finally referred to by this court in its opinion in the Tift case, 206 U. S., 454, in the following language:

> "This court has ascribed to them the strength due to the judgments of a tribunal appointed by law, and informed by experience."
>
> L. & N. Ry. Company *vs.* Behlmer, 175 U. S., 648.

SEVENTH.

Errors in the Circuit Court of Appeals.

Because of the case at bar being identical with the Meeker case, *supra,* save some few immaterial differences, and because both cases were decided by the lower court upon the same theory and conclusions, all of the assignments of error have been sustained by this honorable court in its opinion in the Meeker Case (234 U. S., 749), therefore it is deemed unnecessary to burden the time and atten-

tion of this court by making the exhaustive argument and citations of authorities that would have been necessary had it not been for the extensive consideration and final disposition of all of the questions raised in the case at bar, by this court's decision in the Meeker case.

Practically the only differences between the Meeker case and the case at bar are as follows: The former involved reparation based on *discrimination* as well as on the exaction of *unreasonable rates;* also the statute of limitations as to filing claims before the Commission; the defendants in the trial court did offer some slight evidence on the application of the statute of limitations to certain shipments; the reports and orders of the Commission containing certain inadmissible statements, only the immaterial portions were read by counsel for plaintiffs to the jury; motion for a new trial was denied; the circuit court of appeals reversed the judgment of the trial court and directed a new trial.

Naturally the reports and orders of the Commission in the two cases differ as to the violations of the Act complained of and consequently the different questions arising therefrom; but in contemplation of meeting the requirements of the Act the Report and order in that part of the Meeker case involving reparation based upon *exaction of an unreasonable rate* does not differ from the report and order of the Commission in the case at bar, because in the light of this court's opinion in the

Meeker case *both disclose sufficient findings of fact as a basis for the award.*

That the lower court erred in reversing the judgment of the trial court as well as in reversing that judgment and not awarding a *venire de novo* is clearly pointed out by this honorable court in its opinion in the case of Slocum *vs.* New York Life Ins. Company, 228 U. S., 364.

The lower court in its opinion in the Meeker case, 211 Fed. Rep., 785, discusses its opinion in the case at bar, as a precedent for many of its conclusions in its opinion in the former case. That the lower court committed an egregious error when it concluded that the "pivotal question" in both the Meeker case and the case at bar (p. *65) had been authoritatively and finally disposed of by the opinion of the United States Supreme Court in the case of Penn. R. R. Company *vs.* International Coal Mining Company, 230 U. S., 184, is pointed out by this court in its opinion in the Meeker case, *supra,* when it states:

> "The Commission was authorized and required by section 8 of the Act to Regulate Commerce to award 'the full amount of damages sustained,' and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other complainant was entitled to the award on that basis. The case of the Penn. Ry. Company *vs.* International Coal Mining Company, 230 U. S., 184, is cited as holding otherwise, but it does not do so.

"A shipper without proving that he sustained damages sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to section 8, (p. 203) said: 'The measure of damages was the pecuniary loss inflicted by it on the plaintiff as the result of the rebate paid. These damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered.' Whatever they were they could be recovered. There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; *and in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.*" (Italics ours.)

After quoting the charge of the trial judge to the jury the lower court makes the following conclusion (p. *65).

"We have quoted all that was said in submitting the case to the jury, that we may do no injustice to the learned, and usually carefull judge who delivered the charge. It is impossible to say that the jury were not led to believe that they were justified in considering that the order of the Commission, that these defendant companies should pay the plaintiffs so much money, was *prima facie* evidence of the defendants' liability therefor."

That the reparation orders of the Commission were *prima facie* evidence of the defendants' liability, as stated therein, was decided by this court in its opinion in the Meeker case, *supra.*

According to the Act (section 16) a determination by the Commission that the party complaining is entitled to an award of damages is a prerequisite to the making of such award, and when the Report in the case at bar found the *extent* of the unreasonableness of the $2 rate, *i. e.*, the difference between that and the reasonable rate of $1.45 per ton, basing the reparation on that *extent* or difference between the two rates, it found the damages in favor of the plaintiff and against the defendants; therefore it became unnecessary to say in so many words that the plaintiff was *damaged* to this *extent.* The jugglery of words and niceties of distinction were not contemplated by the act in its requirements as to reparation orders by the Commission.

The lower court was in error in basing its conclusion that notwithstanding the reports and orders of the Commission the plaintiff was obliged to further prove the damages sustained and the liability of the defendants on the opinion of this court in the case of Parsons *vs.* C. & N. Ry. Company, 167 U. S., 460. International Coal Co.

In its opinion in the ~~Parsons~~ case, *supra,* this court stated as follows:

"If plaintiff and one of the favorite companies had both shipped coal to the same market on the same date, the rebate on contract coal may have given an advantage which may have prevented the plaintiff further selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained."

The remaining conclusions of the lower court on which the assignments of error are based are as follows (p. *68):

"In conclusion, we are of the opinion, first, that there were no sufficient findings of fact in these reports of the Commission as required by the statute; second, that if any of the statements in the first report could properly be considered as findings of fact within the meaning of the statute so as to make such findings *prima facie* evidence of the facts found, those facts were not sufficient to support the plaintiff's claim or make out even a *prima facie* case for damages. The plaintiffs were not bound to rely upon *prima facie* evidence. The whole field of inquiry was open to them—the production of such testimony as could be found bearing upon the issue, and notably the additional evidence referred to by the Commission in its second report.

"Failing to produce evidence *prima facie* sufficient to show actual damage suffered, and the amount thereof, the defendants were

not put to a reply, and the plaintiffs must suffer the consequences of their default.

"We think, for the reasons stated, the assignment of error, based on the exception to the refusal of the court to give binding instructions in favor of the defendant companies, must be sustained, and the judgments of the court below reversed. And it is so ordered."

The conclusions of the court below converge on the theory that the proceeding in the circuit court to enforce the payment of the reparation order of the Commission under section 16 of the Act, is not a suit on the award as such, and that the report and order of the Commission awarding reparation are not *prima facie* evidence of anything save the facts therein stated and of the violation of the Act, and even so they create no *prima facie* liability or right of recovery. This is the same theory on which the lower court decided the Meeker case, *supra,* and which was decided by *this* court to be erroneous in its opinion subsequently expressed in that case.

That the lower court erred in reversing the allowance of the trial court for attorneys' fees under section 16 of the act for services rendered in such trial court by counsel for plaintiff, was decided by this court in its opinion in the Meeker case, *supra.*

According to section 16 of the act the counsel for plaintiffs are entitled to attorneys' fees for

services rendered in the appellate court as well as for those in the trial court, if they finally prevail.

L. & N. R. R. Co. *vs.* Dickerson, 191 Fed. Rep., 705.

EIGHTH.

Findings of Fact.

The findings of fact in Reports and Orders of the Interstate Commerce Commission awarding reparation under the Act are in their conclusiveness, accorded by a court the same weight as the findings of fact by the United States Court of Claims. Such findings should be the *ultimate* facts and where they justify the judgments rendered and there is *any* evidence on which such findings could be made, alleged errors of fact are not subject to revision by the court.

Hathaway *vs.* Cambridge National Bank, 134 U. S., 494.

In McClure's *vs.* The U. S., 116 U. S., 145, this court decided as follows:

> "This court will not remand to the Court of Claims a case at law, with directions to return whether certain distinct propositions in a request for findings of fact, presented to that court at the trial of the case, are established and proved by the evidence, if it appears that the object of the request to

> have it so remanded is to ask this court to determine questions of fact on the evidence."

and on page 151 the court referred to the case of Burr *vs.* Des Moines (1 Wall., 99-102), as follows:

> "In that case what was called 'an agreed statement of facts' appeared in the record and the question as to whether it could be considered by this court. Upon this subject it was said:
>
> " 'The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and in the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself without inferences, or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case.' "

In the case of U. S. *vs.* Pugh, 99 U. S., 265, the suit was brought under the "Abandoned and Captured Property Act" and the main controversy was as to whether the proceeds of the sale of property had actually been paid into the Treasury. There was no direct proof of this fact and the Court (of Claims) instead of stating positively in its findings that such a payment had been made, set out all the circumstantial facts established by the evidence tending to show a payment, and gave judgment against the United States. When the

case got to the United States Supreme Court on appeal it was claimed that the findings *were not sufficient* to support the judgment, because it did not appear affirmatively that the proceeds of the property had actually been paid into the Treasury; but this court held otherwise, for the reason that there was nothing left for it to determine, but the necessary legal effect of the *circumstantial facts* found, and in speaking through Mr. Chief Justice Waite, this court stated as follows (page 269):

> "The ultimate fact to be determined in this case is whether the proceeds of the sale of the captured property belonging to the claimant have been paid into the Treasury. No direct proof to that effect has been given but if shown at all it is by way of inference from certain circumstantial facts which have been established by the evidence. These circumstantial facts are set forth in the finding which has been sent here as the finding upon which alone a judgment was rendered, and as the case stands, the question we are to decide is whether those facts are sufficient to support the judgment. Confessedly, the court has found all the facts which have been directly established by the evidence. These facts are not evidence, in the sense that evidence means the statements of witnesses or documents produced in court for inspection. They are the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law. If what has been found is in the absence of anything to the

> contrary the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the Treasury, the judgment is right. Otherwise, it is wrong."

And on page 270:

> "The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact, and when the evidence in the case has performed its part and brought out all the facts that have been proved, these facts thus established are to be grouped, and their legal effect as a whole determined."
>
> Stone *vs.* U. S., 164 U. S., page 380.
>
> Union Pacific Ry. Co. *vs.* U. S., 116 U. S., 154.

As to the manner of raising objections and preparing bills of exception attacking the sufficiency of findings of fact, this court in its opinion in the case of *The Francis Wright,* 105 U. S., 381, stated the following on page 390:

> "And so if the exception is as to the facts that are found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated into the bill of exceptions. In this way the court below would be fairly advised of the nature of the complaint that was made in time to correct its error, if satisfied one had been committed,

> or to put into the bill of exceptions all it considered material for the support of the rulings."

In the case at bar objections to admission in evidence of the Reports and Orders of the Commission were based mainly on the alleged insufficiency of the findings of fact therein. But this insufficiency was not specifically pointed out to the trial court, as it should have been.

U. S. *vs.* New York Indians, 173 U. S., 464.

(See page 470.)

In Conclusion.

The Commission is expressly required by section 12 to enforce the provisions of the Act and by section 17 the procedure for this purpose is left entirely to the discretion of the Commission; thus we find the following provisions, among others, in section 17 of the Act:

> "That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and the ends of justice * * * said Commission may from time to time, make or amend such general rules, or orders as may be requisite for the order and regulation of proceedings before it."

In view of the weight and importance attached by this Court to the findings of the Commission as

expressed by it in the case of Southern Ry. Co. *vs.* Tift, 2 U. S., 206, 428, would the "ends of justice" referred to in section 17 of the Act, *supra,* be carried out by denying the plaintiff reparation for a violation of the Act conclusively shown, and this because the Report of the Commission is not read with the clear purpose of realizing its logical and true import?

Can it be presumed that the Commission did not have before it at the time of making the award for reparation sufficient evidence to determine that plaintiffs were entitled to a recovery?

Does a careful reading of the Report awarding reparation warrant the conclusion that the Commission when it included interest with the reparation from a given date did not find such date to be that of the last shipment made by plaintiff under the unreasonable rate over the road of the carrier against which such order is specifically directed?

How did the Commission find that the 189 carloads of pyrites cinder amounted to 5,175-1590/2240 tons in weight, and how did it find that an unreasonable and excessive portion of the abrogated rate, *i. e.,* 55 cents a ton when applied to the aforesaid number of tons amounted to $2,846.55?

How did the Commission find that the shipments giving rise to the complaint within the period of the statute of limitations aggregated as follows:

On the Buffalo & Rochester & Pittsburgh Ry. Co. and P. & R. Co., 189 carloads.
On the N. Y. C. & H. R. Ry. Co. and P. & R. Ry. Co., 13 carloads.
On the L. & W. and the C. Ry. of N. J., 31 carloads.
On the Lehigh Valley Ry. Co. and the C. Ry. Co. of N. J., 74 carloads.
On the Lehigh Valley Ry. Co. and the P. & R. Ry. Co., 172 carloads.

The above are all findings of *ultimate facts* by the Commission in its Report and Order awarding the reparation which each of the carriers is directed "to pay unto the complainant, Naylor & Company."

Can it be presumed that after the Commission heard additional evidence and oral argument as is stated in its Report on the rehearing that such evidence was *not* considered as a basis for the award, especially when the Report contains these words: *"we now find that the rate of $2 per gross ton assessed and collected by the defendants on the shipments giving rise to the complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations."*

Clearly the Commission *now finds* as a result of the *additional evidence* something different from

what it found in the original Report, *i. e.*, * * * "the complainant is entitled to reparation." * * *

The Commission has always proceeded in awarding reparation on the theory that it was doing so in compliance with the requirements of the Act and it will work a great injustice to the plaintiff if, after experiencing the travail of prosecuting this claim, he should be denied reparation for the want of compliance with a mere technicality or matter of form as opposed to substance.

Baer Brothers *vs.* Denver & R. G. Ry. Co., 233 U. S., 479, 488.

Seaboard Air Line Ry. Co. *vs.* Seegers, 207 U. S., 73, 77-78.

Riverside Mills *vs.* A. C. L. Ry. Co., 168 Fed., 989.

U. S. *vs.* Hill, 120 U. S., 169, 180.

New Haven R. R. Co. *vs.* Int. Com. Com., 200 U. S., 361, 401-2.

Logan *vs.* Davis, 233 U. S., 613, 627.

The defendants in the case at bar offered no evidence in rebuttal to that presented by the plaintiff, but were content to rely on the insufficiency of the Reports and Orders of the Commission introduced in evidence, when they should have pointed out to the trial court that the evidence presented before the Commission did not support the findings of fact in the Report, or they should have produced affirmative evidence tending to

show that the plaintiff sustained no damages as a result of the exaction of the unreasonable rate or not the amount of damages awarded by the Commission. Inasmuch as they did none of these things, they cannot now be heard to question the correctness of the award made.

Mitchell Coal Company *vs.* Pa. R. R. Co., 230 U. S., 247, 258.

Texas & Pacific Ry. Co. *vs.* Abilene Cotton Oil Company, 204 U. S., 426.

As to the specifications of error which may appear not to have been discussed herein specifically, we rely on this brief generally for sustaining the same.

The judgment of the trial court in this case should be "affirmed as modified," the same as was done by this honorable court in its opinion in the case of Meeker *vs.* Lehigh Valley Ry. Co., 234 U. S., 749.

Also this court is respectfully requested to direct the allowance of additional counsel fees for services rendered in the appellate court by counsel for plaintiffs.

FRANK VAN SANT,
ARTHUR R. THOMPSON,
Washington;
V. F. GABLE,
Philadelphia,
Counsel for Plaintiffs in Error.

WASHINGTON, D. C., *April* —, 1915.

No. 631.

OCTOBER TERM, 1914.

IN THE

Supreme Court of the United States.

WILLIAM H. MILLS, as Surviving Partner and Liquidator of T. Mitchell Clark, WILLIAM H. MILLS and T. ARMSTRONG RAWLINS, Co-partners, trading under the firm name of Naylor & Co., Plaintiff in Error,

vs.

LEHIGH VALLEY RAILROAD COMPANY, BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY, NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *ET AL.*

In Error to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR DEFENDANTS IN ERROR.

EDGAR H. BOLES,
HENRY S. DRINKER, JR.,
JOHN G. JOHNSON,
SAMUEL DICKSON,
For Defendants in Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914. No. 631.

William H. Mills, as surviving partner and liquidator of T. Mitchell Clark, William H. Mills and T. Armstrong Rawlins, co-partners, trading under the firm name of Naylor & Co., Plaintiff in Error,

vs.

Lehigh Valley Railroad Company, Buffalo, Rochester and Pittsburgh Railway Company, New York Central and Hudson River Railroad Company, et al.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

In the recent decision in Meeker *vs.* Lehigh Valley Railroad Company 236 U. S. 411, this Court has either directly decided or has so clearly

indicated its position on all the essential questions involved in the present appeal as to render it futile for either side to attempt a re-discussion of the questions so disposed of.

Although certain matters discussed in the opinion in that case were not, we think, so directly presented for decision as they are in the case at bar, yet the Court's view on such matters is so clearly indicated that we do not intend to burden the Court with the task of going over them again.

Nor do we propose to take up the time of the Court with a consideration of the decision in the Slocum case, merely remarking in passing that in the Circuit Court of Appeals, complainants did not dispute the power of the Court to enter judgment for defendants, provided they sustained their construction of the law. The question as to whether the Circuit Court of Appeals should properly have entered judgment for defendants, or ordered a new trial, is now raised for the first time in this Court.

The greater part of the Brief of the plaintiffs in error is devoted to demonstrating the error of the Court below in respect to the matters which this Court has thus decided against us and which we accept without question. But a short portion of such Brief attempts to discuss the one essential point in which this case differs radically from the Meeker case and the ruling by this Court on which we confidently submit will be conclusive of the soundness of our position.

The Judgment of the Court Below.

The opinion of the Circuit Court of Appeals in the case at bar was rested on two distinct grounds, either one of which, if sound, was sufficient to sustain the decision.

The first of these grounds is that the opinions and orders of the Commission, which constitute the only evidence of the impropriety of the rate in question, contained no findings of the primary facts of transportation sufficient to warrant the conclusion that the rate on pyrites cinder should not exceed that on iron ore, a competitive commodity. The Court being of opinion that the "findings of fact" which by the Act were made *prima facie* evidence in the District Court, were restricted to the primary facts and did not include the conclusions by the Commission from those facts, it followed that the mere conclusion by the Commission that the rate was excessive was not of itself sufficient to carry the case to the jury.

In the Meeker case—unlike the case at bar—the Commission had found the primary facts as well as the ultimate facts and the question was merely as to whether, in view of the failure by defendants to make a positive objection, it was proper that certain conclusions by the Commission, as well as the primary facts found, were read to the jury. There the point at issue was as to the prejudicial effect of evidence admitted without specific objection; here it is as to the sufficiency of all the evidence as the basis of the verdict.

In spite, however, of the foregoing distinction, this Court on pages 427 and 428 of the opinion in the Meeker case, distinctly states its opinion that the findings of fact which are made *prima facie* evidence, are not merely the primary or evidential facts, "from which through a process of reasoning and inference the ultimate facts may be obtained," but include these ultimate facts as well. Under this ruling a finding by the Commission that the rate in question is unreasonable or discriminatory is of itself sufficient evidence, in a reparation case, of the impropriety of the rate, even though in the Commission's opinion it refers to none of the circumstances of transportation, shown by the evidence, which led it to reach that conclusion.

In the case at bar the Commission distinctly found that the rate on pyrites cinder should not exceed that on iron ore (Record, page 35), and issued an order requiring the establishment by defendants of rates on pyrites cinder no higher than those contemporaneously applied to the competitive commodity.

This finding by the Commission, in the light of the ruling by this Court above referred to, disposes of the first ground on which the judgment of the Court below was rested, and we accordingly dismiss it from further consideration.

The **second** distinct ground for the decision of the Circuit Court of Appeals was that the **record before the District Court contained no evidence that the complainants had suffered any actual injury or damage.**

In Parsons *vs.* Railway, 167 U. S., 460, this Court stated two essential and indispensable elements to sustain a judgment of damages for violation of the Interstate Commerce Act:—

> "Before any party can recover under the Act, he must show **not merely the wrong of the carrier, but that that wrong has in effect operated to his injury.**"

The Circuit Court of Appeals held in the case at bar that the plaintiff had failed in both particulars. He had failed to show by **proper evidence** that the rate was improper, and he had failed to show by **any evidence** that he had suffered actual damage.

In the first particular, under the subsequent ruling of this Court, the Court below was wrong.

In the second, under the same ruling, it was clearly right, and to a demonstration of this we propose to devote the present argument.

In view of the narrowness of the question to which the present issue is thus restricted, but little discussion will be required. Before taking it up, however, we desire to point out, very briefly, a subsidiary feature in which the case at bar differs from the Meeker case and a consideration of which demonstrates even more conclusively than if it were not present, the soundness of our position.

The Meeker Case was one Involving Essentially the Inherent Reasonableness of the Rate; the Case at Bar Involved merely the Relation of Rates.

Althougn it is true that in the first of the proceedings before the Commission in the Meeker case, there was involved the question of a discrimination in favor of the Lehigh Valley Coal Company, yet even in that proceeding the Commission's order required, not merely the equalization of the rates charged complainants with those charged the Lehigh Valley, **but the specific reduction of the rates to prescribed amounts.***

The second proceeding before the Commission was one involving a question purely of inherent unreasonableness and the order required the establishment of rates not to exceed given amounts.

In the case at bar, however, the complainant did not attack the pyrites rate as inherently unreasonable, but merely as unreasonable as compared to the rate in force on iron ore, a competitive commodity. The decision and order of the Commission is **not** that the rate must not exceed a specified figure, **but merely that it must**

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*Meeker, Record, page 43:—

"We are of opinion, and so find that defendant's rates for the transportation of coal from the Wyoming Region to Perth Amboy of $1.55 per gross ton on prepared sizes, $1.40 on pea coal, and $1.20 on buckwheat coal, are unreasonable, so far as they exceed $1.40 on prepared sizes, $1.30 on pea coal, and $1.15 on buckwheat." Order issued accordingly.

not exceed that contemporaneously in force on iron ore.

The first opinion of the Commission concludes as follows (Record, page 35):—

> "We are of opinion that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded."

The order provides that defendants establish and maintain for two years, on pyrites cinder, "no higher rates than are in force over their lines on iron ore between said points." (Record, page 36.)

In its second opinion, in which it reversed its previous ruling and awarded reparation, it refers to the previous decision as one whereby "defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points." (Record, pages 37-38.)

While it is true that the second opinion and order of the Commission contain language from which it may be argued that in connection with the awarding of reparation the Commission found the $2 rate to be unreasonable to the extent that it exceeded $1.45, the rate actually in effect on iron ore, yet at the same time, in view of the order which the Commission actually issued in the first proceeding, and its own description of it in the second opinion, it is apparent that the essential basis for its ruling was not the inherent reason-

ableness of the rate but its relation to the rate on a competitive commodity.

This is clearly shown by the complainants' own petition to enforce the Commission's order in the District Court. They allege not that the $2 rate is unreasonable *per se* but merely (Record, pages 5-6):—

> "That the aforesaid transportation rate of $2 on pyrites cinder, as claimed in the aggregate in paragraph one hereof, was unlawful and excessive and the exacting, charging and collecting of same by the defendant from your petitioners for the transportation services rendered was a greater compensation than was demanded, collected and received from other parties for the performance by the defendants as common cariers of a like and contemporaneous service in the transportation of a like commodity under substantially similar circumstances and conditions, to wit, of iron ore, upon which the rate was $1.45 per ton to similar points of destination, as appears set forth more at length in Exhibits B and C, which are attached hereto as part of this petition." (Exhibits B and C referred to were the two opinions of the Commission.)

The relevancy of the foregoing considerations to the main point at issue in the present case is apparent.

Even in case of rates alleged to be unreasonable *per se,* it does not follow that one who is charged the excessive rate is on that account alone entitled to recover back the difference between the rate charged and that found to be reasonable. For all

that may appear the shipper may have sold the commodity shipped at the usual profit, in which case it would be the consignee and not the shipper who would be entitled to recover the damages.

In a case, however, where the basis of the wrong by the carrier is not the inherent unreasonableness of the rate, but its relation to the rate charged some other shipper or exacted on some competitive commodity, the foregoing considerations have double force. Here, not only may the shipper have passed on the actual damage to his consignee; there may have been no damage whatever to anyone, or if there has been actual injury, the measure thereof may be and usually is entirely distinct from the difference between the rates. The shipper of 100,000 tons at $1 per ton may suffer no damages whatever because of the haul of one ton for nothing for another; and on the other hand he may suffer an actual loss of his entire business because prevented from shipping at all by reason of discriminatory rates or privileges accorded to a competing shipper on a competitive commodity.

The Commission's order in the present case merely required the equalization of the pyrites rate with that on iron ore. If the defendant's rate on iron ore had all along been $2.00 instead of $1.45 there would have been no basis for the order, and the pyrites rate would have been proper. Yet in this view of the case how could complainants be said to have been damaged? The complainant in such cases must show not merely that he would have been 55 cents per ton better off if

his product had been hauled at the lower rate, but that the same damage would have resulted if the competitive commodity had been hauled at the higher rate.

This question has been so recently considered by this Court in Pennsylvania Railroad Company *vs.* International Coal Mining Company, 230 U. S. 184, that a further elaboration is unnecessary. We may therefore turn to the real point at issue.

In the Meeker Case the Commission Expressly found that the Complainant was Damaged in a Specified Amount; the Commission's Opinions and Orders in the Case at Bar contain no such Finding.

In the Meeker case it was strongly urged on this Court that the record contained no evidence that the complainants had suffered actual damage.

This Court, however, overruled this contention on the ground that the Commission had expressly found that the complainant had been "damaged to the extent of the difference" between what he paid and what he should have paid.

"The plain import of the findings," said Mr. Justice Van Devanter, "is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it."

There the Commission had made a specific find-

ing of actual damage, which was enough to constitute a *prima facie* case.

In the case at bar, however, the Commission did not find that the complainant had suffered any actual damage. It merely awarded reparation on the basis of the different rates, taking it for granted, as was customary prior to the International Coal Mining Case, that if the Commission in its discretion concluded to award reparation the measure thereof was the difference in the rates. (See 230 U.S. 241-242)

This is made even clearer by Judge Holland's charge to the jury. He said (Record, page 43):—

> "You have nothing, then, before you except that the Interstate Commerce Commission found that these railroads **owe this plaintiff so much money,** and that it has not yet been paid."

The basis of the liability by the defendants in Judge Holland's view of the case, was the finding or judgment of the Commission that defendants owed the plaintiff the amount specified in the order.

It was on this basis that suit was brought in the District Court.

The petition filed was not to recover actual damages suffered as a result of the defendant's discriminatory charges, but to enforce the order of the Commission, as in the case of a suit for a penalty or on a judgment of a foreign state.

In the petition it is nowhere alleged that the complainant has suffered actual damage.

This fact was specifically relied on by the Circuit Court of Appeals in reversing the judgment of the Court below.

Judge Gray quotes from the opinion of Mr. Justice Lamar in Pennsylvania Railroad Company *vs.* International Coal Mining Company, as follows (Record, page 66):—

> "But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable feature that **in its pleading the plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury.** It contends, however, that this was not necessary, for the reason that, as a matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time, over the same route.

This passage is directly in point. Although the question was there raised in a different manner from that in the case at bar, yet the principles involved were identical.

There, as here, the plaintiff neither alleged in his pleadings, nor proved by his evidence, that he had suffered any actual damage, relying on the mistaken supposition that he was entitled, **as matter of law,** to recover the difference between the two rates.

The mere fact that the Commission directed the payment of reparation or awarded a given sum as reparation, is not equivalent to a specific

finding that the complainant has suffered actual damage.

The damages for which the Act permits recovery are not in the nature of a penalty, or of a return of that part of a rate paid which exceeds that paid on a competitive commodity; they are compensation for **actual injury suffered.** In order to recover such damages, the complainants were required by the Act to bring a suit in the District Court, which, the Act required should proceed "in all respects like the other civil suits for damages."

No civil suit for damages would warrant a recovery unless it alleged actual damages. In this, the present suit was defective.

Further, in no civil suit of this nature would a verdict be justified, unless the record contained specific proof of actual damage to the complainant as the result of the wrongs alleged.

No such evidence or proof was presented in the present case.

The opinions and orders of the Commission, although *prima facie* evidence of the facts found, do not contain any finding that complainant has been injured or has suffered actual damage. All that the reports find is, as said by Judge Holland, "that the defendants owe this plaintiff so much money," and that the Commission has directed its payment, **not because complainants have been actually damaged to that extent, but merely because that sum represents the difference between the rates.**

In the Meeker case, the Commission expressly found that the complainant had suffered actual

damage to the extent of the difference between the rates. This Court accordingly held that the Commission's finding was sufficient, until rebutted, on which to base a verdict of actual injury.

In the present case there is no such finding, and therefore nothing either in the pleadings or in the evidence in connection with this essential feature of the case.

In the Meeker case this Court, in enumerating the essential requirements of an opinion and order of the Commission sufficient to constitute a *prima facie* case in the District Court, specified particularly the following:—

> "(5) Whether, if there was unjust discrimination, **the shipper was injured thereby,** and, if so, the amount of his damages; * * *"
>
> "(7) Whether, if the rate was excessive and unreasonable, **the shipper was injured thereby,** and, if so, the amount of his damages."

In both discrimination and unreasonable rate cases, therefore, it is necessary, to constitute a complete *prima facie* case, that the Commission's opinion and order contain an express finding that the complainant **has suffered actual injury or damage and to what amount.**

Unless the Commission's report contains such a finding, it is the duty and privilege of the complainant to offer additional evidence to supplement it.

This the complainant in the present case was

free to do but of this opportunity he did not see fit to avail himself, very probably for the reason that, as in almost all such cases, it would have been impossible for him to have proved any real actual injury.

It is urged by the plaintiffs in error that, on the analogy of appeals from the Court of Claims, findings of ultimate facts by the Commission will be sustained if there is any evidence to support them.

Without disputing this conclusion, it is apparently inapplicable to the present case. If the Commission had here found the necessary ultimate fact that complainants had suffered actual damage, this finding could doubtless not be attacked on the ground that the evidence before the Commission to support it was insufficient. This was decided in the Meeker case.

Here, however, the Commission has failed either to make the necessary finding as to actual damages or to find primary facts from which such damage is necessarily inferrable. It is not a question of the conclusiveness of the Commission's finding, but of its existence.

Plaintiffs in error appear, by their argument, to consider that there was some duty on the defendants in the District Court to point out to them in what respect their proof was defective.

This is such a radical departure from the established rules in the trial of cases, that we do not deem it necessary to discuss it.

Conclusion.

In the Meeker case, the Commission expressly found "upon consideration of the evidence adduced upon the hearing upon the question of reparation," that Meeker & Co. were "damaged to the extent of the difference" between the rate paid and that declared to have been a reasonable rate.

This Court held that such a finding was one of the essential elements in a *prima facie* case in the District Court but in that case it had been made by the Commission.

In the case at bar, there is no such finding and no additional evidence of actual damage was offered. The evidence was therefor insufficient to sustain a verdict and the judgment entered on it by the District Court is not sustainable.

EDGAR H. BOLES,
HENRY S. DRINKER,
JOHN G. JOHNSON,
SAMUEL DICKSON,
For Defendants in Error.

MILLS, AS SURVIVING PARTNER OF NAYLOR & COMPANY, *v.* LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 631. Argued May 11, 1915.—Decided June 21, 1915.

In a suit under § 16 of the Act to Regulate Commerce, a report of the Interstate Commerce Commission finding that the rate complained of was unreasonable, and awarding specified amount for reparation, is *prima facie* evidence of the damages sustained although the evidential or primary facts are not set forth. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412; *id.* 434.

Where the Interstate Commerce Commission makes an award to a

shipper complaining of unreasonable and discriminatory rates, as reparation, it expresses such decision as a matter of ultimate fact, and under the provisions of the Act to Regulate Commerce the form of expression is not confined to a particular formula.

The Act to Regulate Commerce does not allow any attorney's fee for reparation proceeding before the Commission, but only allows such a fee in an action in the courts based on the reparation award. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 432.

THE facts, which involve claims of shippers against the carriers for unreasonable and discriminatory rates, are stated in the opinion.

Mr. V. F. Gable and *Mr. Arthur R. Thompson*, with whom *Mr. Frank Van Sant* was on the brief, for plaintiff in error:

The report and order of the Commission awarding reparation discloses sufficient findings of fact on which the award is based.

The measure of damages is proper.

The Commission's report on rehearing is based on report of original hearing.

There was no error in the trial court, but the Circuit Court of Appeals erred. *Allen* v. *C., M. & St. P. Ry.*, 16 I. C. C. 293; *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479; *Burton* v. *Driggs*, 87 U. S. 125; *Burr* v. *Des Moines*, 1 Wall. 99; *Cassell* v. *B. & O. Ry.*, 8 I. C. C. 333; *Commercial Club of Omaha* v. *C. & N. Ry.*, 7 I. C. C. 386; *Hathaway* v. *Cambridge Nat'l Bank*, 134 U. S. 494; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91; *Louis. & Nash. R. R.* v. *Behlmer*, 175 U. S. 648; *Lehigh Valley Ry.* v. *Clark*, 207 Fed. Rep. 717; *Lehigh Valley Ry.* v. *Meeker*, 211 Fed. Rep. 785; *Logan* v. *Davis*, 233 U. S. 613; *McClure* v. *United States*, 116 U. S. 145; *Meeker* v. *Lehigh Valley Ry.*, 236 U. S. 412; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Naylor & Co.* v. *Lehigh Valley Ry.*, 15 I. C. C. 9; *New Haven R. R.* v. *Int. Com.*

Comm., 200 U. S. 361; *Penna. Ry.* v. *International Coal Co.*, 230 U. S. 184; *Parsons* v. *C. & N. Ry.*, 167 U. S. 447; *Louis. & Nash. R. R.* v. *Dickerson*, 191 Fed. Rep. 705; *Perry* v. *F., L. & Cen. Penn. Ry.*, 5 I. C. C. 97; *Riverside Mills* v. *Atlantic Coast Line*, 168 Fed. Rep. 989; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73; *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364; *Southern Ry.* v. *Tift*, 206 U. S. 428; *Stone* v. *United States*, 164 U. S. 380; *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Un. Pac. Ry.* v. *United States*, 116 U. S. 154; *United States* v. *Balt. & Ohio Ry.*, 226 U. S. 14, 20; *United States* v. *Pugh*, 99 U. S. 265; *United States* v. *N. Y. Indians*, 173 U. S. 464; *United States* v. *Hill*, 120 U. S. 169; *Wright* v. *United States*, 105 U. S. 381.

Mr. Henry S. Drinker, Jr., with whom *Mr. Edgar H. Boles*, *Mr. John G. Johnson* and *Mr. Samuel Dickson* were on the brief, for defendants in error.

Mr. Justice Hughes delivered the opinion of the court.

During the years 1906 and 1907, Naylor & Company—a firm of which the plaintiff in error is surviving partner—were shippers of pyrites cinder over the lines of the defendants in error from Buffalo, New York, to points in Pennsylvania and New Jersey. The published rate was $2 per gross ton. On April 4, 1908, these shippers filed a complaint with the Interstate Commerce Commission, alleging that the rate was 'excessive,' 'unreasonable' and 'unjustly discriminatory.' They asked that the railroad companies be ordered to desist from exacting the rate, that a lower rate be fixed, and that reparation be granted. The defendants answered and, after hearing, the Commission made its report on January 5, 1909, holding 'that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo.' The rate on iron ore was $1.45 per

ton to points of destination to which there was a rate of $2 on pyrites cinder. Reparation was refused. *Naylor & Company* v. *Lehigh Valley Railroad Company*, 15 I. C. C. 9. Order was made accordingly.

On May 8, 1909, Naylor & Company filed with the Interstate Commerce Commission a motion for a rehearing on the question of reparation alone, and the motion was granted. Additional evidence was taken and various sums were awarded by the Commission against the respective companies as reparation on shipments made within the period of limitation. The order was made on June 2, 1910.

In May, 1911, this suit was brought, pursuant to § 16 of the Act to Regulate Commerce, in the Circuit Court of the United States for the Eastern District of Pennsylvania to recover the several amounts of money set forth 'as and for damages and reparation' in accordance with the Commission's order. Issue was joined by a plea of not guilty. Upon the trial, the two reports and orders of the Interstate Commerce Commission, above mentioned, were received in evidence over objection. There was testimony that the amounts awarded had not been paid. That constituted the case for the plaintiffs, and the defendants offered no evidence. A request by the defendants for 'binding instructions' in their favor was refused. The case was submitted to the jury with the instruction, in substance, that the finding of the Commission was *prima facie* evidence of the facts and that it was for the jury to say whether the plaintiffs were entitled to recover the amount of money claimed. A verdict was returned for the plaintiffs in specified amounts which appear to be the same as those awarded by the Commission with interest to date. The defendants then moved for judgment *non obstante veredicto*. The motion was dismissed and judgment ordered for the plaintiffs on October 30, 1912. At the same time, the trial court allowed to the counsel for the plaintiffs a fee of $1,000 for their services in the proceedings

before the Interstate Commerce Commission and a further fee of like amount for their services in this suit; and to this allowance the defendants excepted. Exceptions having also been taken to the refusal of the request of the court to direct a verdict for the defendants, to the instruction given, and to the dismissal of the motion for judgment *non obstante veredicto*, proceedings in error were had before the Circuit Court of Appeals, where the judgment was reversed, without directing a new trial. *Lehigh Valley R. R.* v. *Clark*, 207 Fed. Rep. 717. And to review the judgment, this writ of error has been prosecuted.

The grounds of the ruling of the court below are: first, that there were no sufficient findings of fact in the reports of the Commission, as required by the statute; and, second, that the plaintiffs had failed to present any evidence which made out a *prima facie* case of damage sustained. That is, it is said that if the statements in the first report of the Commission could be regarded as findings of fact within the meaning of the statute so as to make them *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim; and that there were no facts found in the second report which entitled the plaintiffs to go to the jury.

The fundamental question thus presented, with respect to the effect of the Commission's reports and orders, has recently been determined in *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, and, in the light of the conclusion there reached, little need now be said. In dealing with the objection that the reports and orders of the Commission then before the court did not contain any findings of fact, or at least not enough to sustain an award of damages, it was held that the statute does not require a statement of the evidential or primary facts. The court said: "We think this is not the right view of the statute and that what it requires is a finding of the ultimate facts—a finding which, as applied to the present case, would dis-

close (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper . . ; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper . . . was excessive and unreasonable and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and if so, the amount of his damages."

In the case now under consideration, the first report of the Commission was concerned only with the rates which should be charged. No reparation was allowed and no findings whatever were made as to damages.

The second report is as follows:

"In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. *Naylor & Co.* v. *L. V. R. R. Co.*, 15 I. C. C. 9.

"Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.

"We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations. *Detroit Chemical Works* v. *N. C. Ry. Co.*, 13 I. C. C. Rep. 357; *Same* v. *Erie R. R. Co.*, 13 I. C. C. Rep. 363.

"The Buffalo, Rochester & Pittsburg Railway Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,846.55, with interest from November 21, 1907, as reparation for the collection of unreasonable charges on 189 carloads of pyrites cinder aggregating 5,175–1590/2240 tons in weight moving from Buffalo to various Pennsylvania points.

"The New York Central & Hudson River Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $248.93, with interest from April 19, 1907, as reparation for the collection of unreasonable charges on 13 carloads of pyrites cinder aggregating 452–1370/2240 tons in weight, moving from Buffalo to various Pennsylvania points.

"The Delaware, Lackawanna & Western Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $487.52, with interest from September 23, 1907, as reparation for the collection of unreasonable charges on 31 carloads of pyrites cinder aggregating 886–960/2240 tons in weight, moving from Buffalo to Newark, N. J.

"The Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey will be required to refund to the complainant $1,024.15, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 74 carloads of pyrites cinder

aggregating 1,862–220/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

"The Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company will be required to refund to the complainant $2,362.23, with interest from November 13, 1907, as reparation for the collection of unreasonable charges on 172 carloads of pyrites cinder aggregating 4,295–20/2240 tons in weight, moving from Buffalo to various Pennsylvania and New Jersey points.

"It will be ordered accordingly."

This report, it will be observed, shows the relation of the parties as shipper and carrier in interstate commerce; the general character of the traffic involved and the amount of the shipment with respect to which reparation was claimed; the determination that the rate exacted (which was specified) was unjust and unreasonable to the extent that it exceeded the established rate (also specified); and, further, the determination that the companies respectively should pay a stated amount 'as reparation for the collection of unreasonable charges' on the quantities mentioned. It is at once apparent that these findings meet the test laid down in the *Meeker Case*, unless it can be said that they were insufficient as to the amount of damages suffered. Thus, there would seem to be no room for question that the finding that the rate charged was unreasonable is a sufficient finding. The Commission stated: "We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton." It is insisted that, in view of the provisions of the first order, and the Commission's description of it in the second report, the essential basis of the ruling was not the inherent reasonableness of the rate established but its relation to the rate on a competitive commodity. We think, however, that the specific

finding in the second report that the rate exacted 'was unjust and unreasonable' to the extent specified, was a finding as to the ultimate fact of unreasonableness which should be taken precisely as made. The finding in this respect is substantially the same as that in the second *Meeker Case* (236 U. S. 434, 435, 436).

As to the amount of damage sustained, there would be no question if the Commission had found, as in the case last cited, that the shipper 'was damaged' to the amount mentioned. The distinction attempted to be drawn is that in the case referred to there was a statement that the shipper 'was damaged' while in the present case the Commission held that he was entitled to the stated amount 'as reparation.' In both cases, the amount actually allowed was the difference between the amount charged and that which would have been payable at the rate sanctioned. The difference between the findings in the two cases, we think, is merely in the form of words used.

When the Commission made the award '*as reparation*' they undoubtedly expressed the decision, as a matter of ultimate fact, that there was injury to this extent to be repaired. No other intelligent construction can be put upon their statement. If, as was held in the second *Meeker Case*, a finding of the amount of damage as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction, and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the

Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, *prima facie* the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case.

There was error, however, in the allowance of the fee for services before the Commission. 236 U. S. 432, 433.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is modified by striking out the allowance of $1,000 as attorney's fee for services before the Commission, and is affirmed as so modified.

It is so ordered.